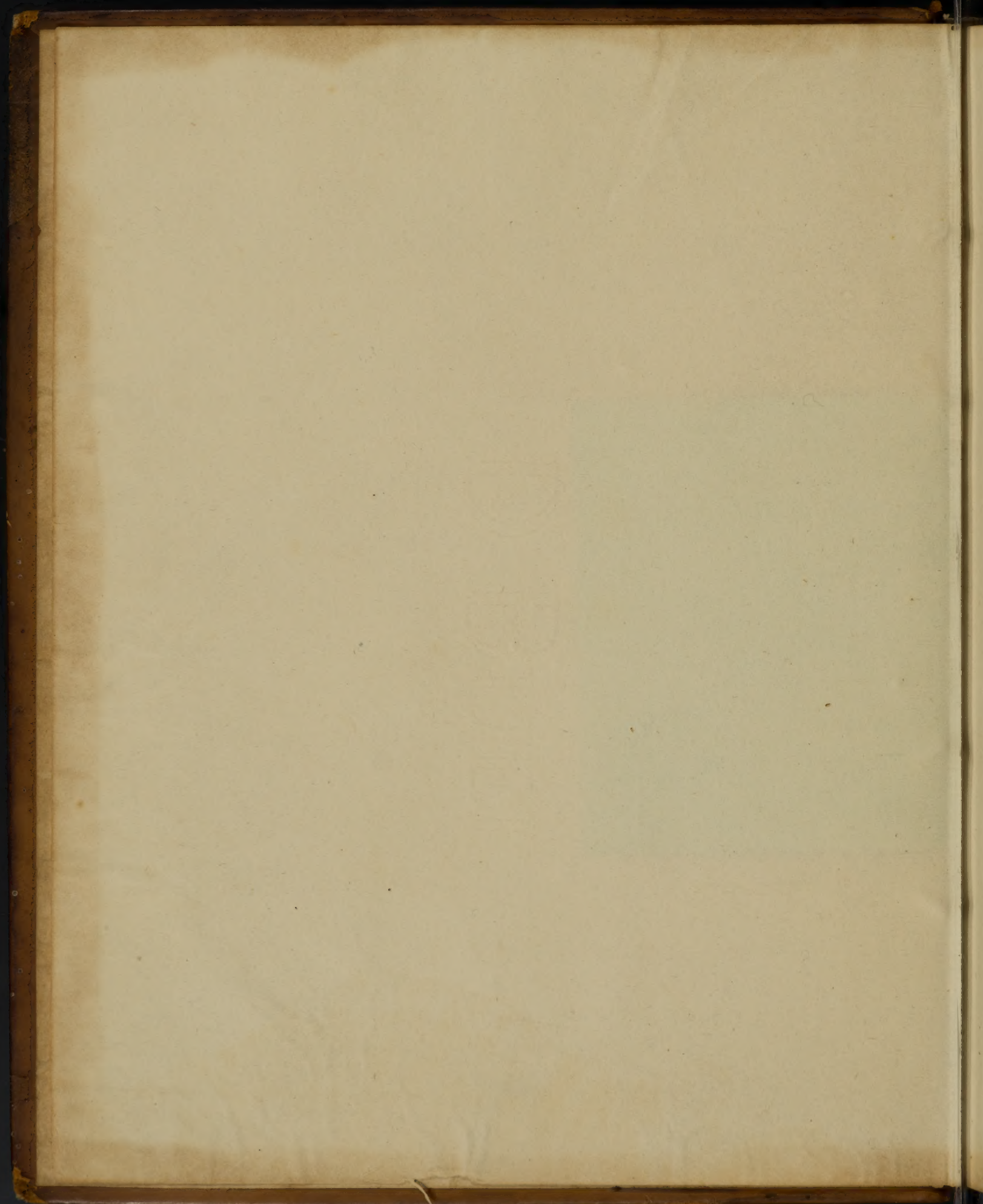


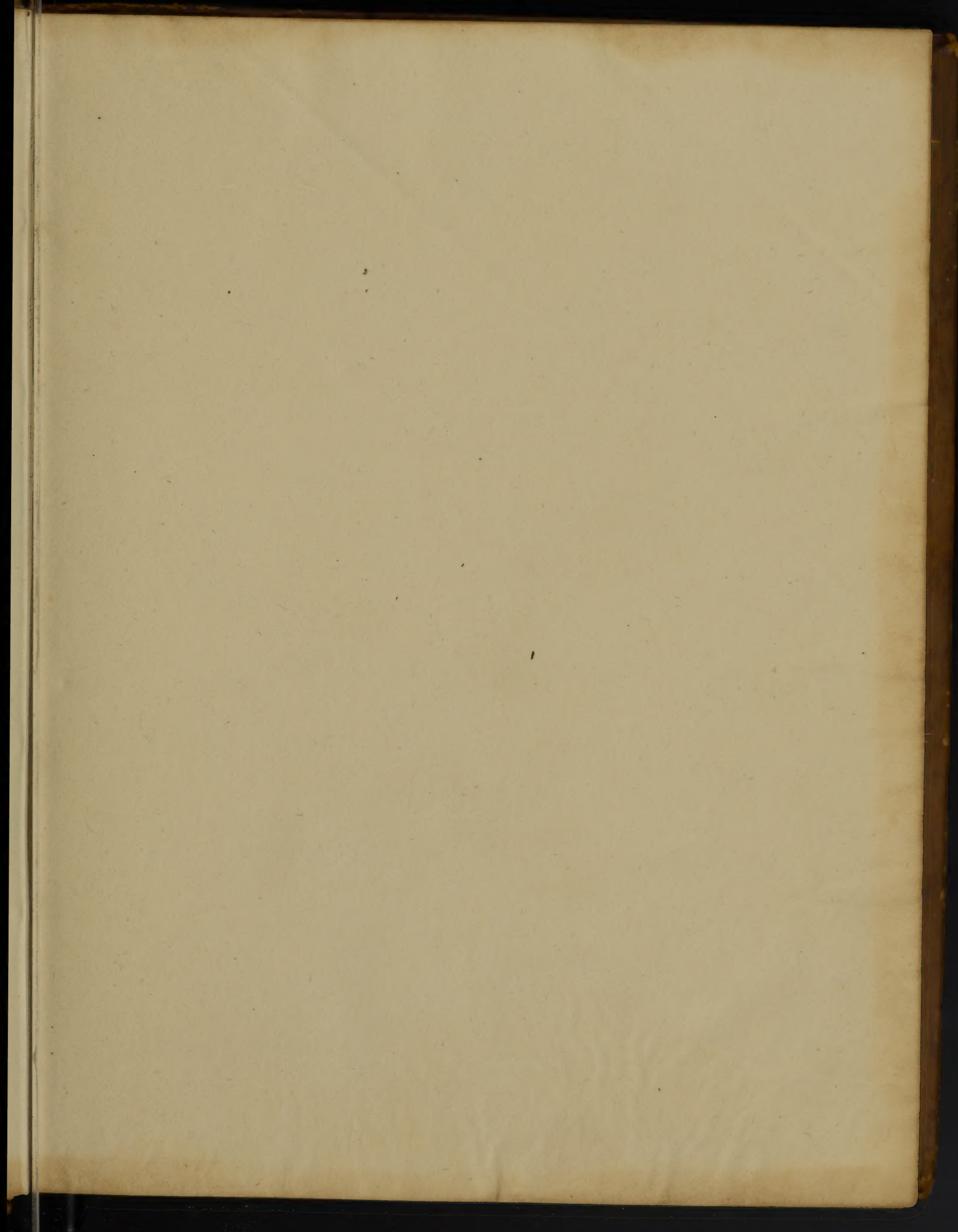
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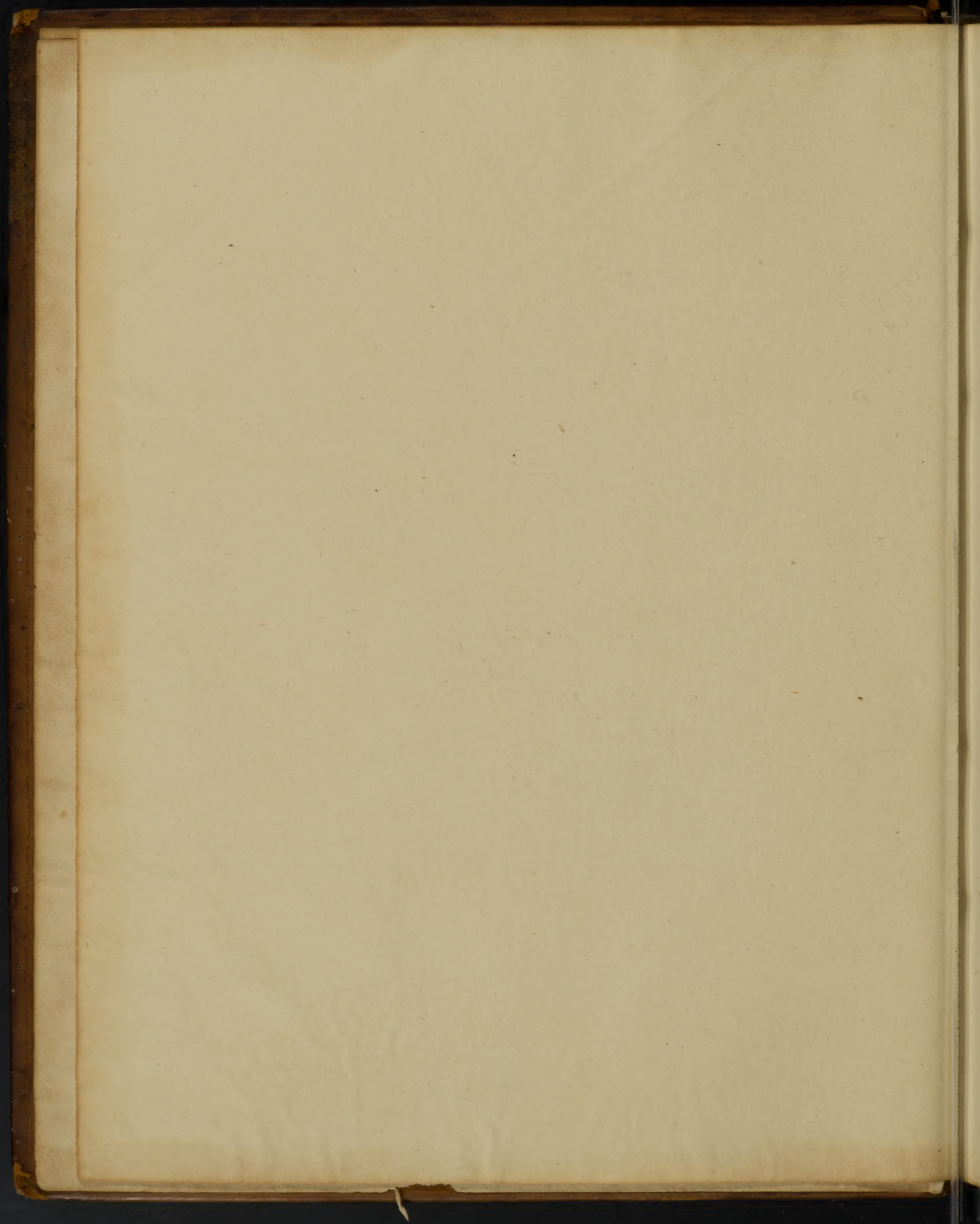
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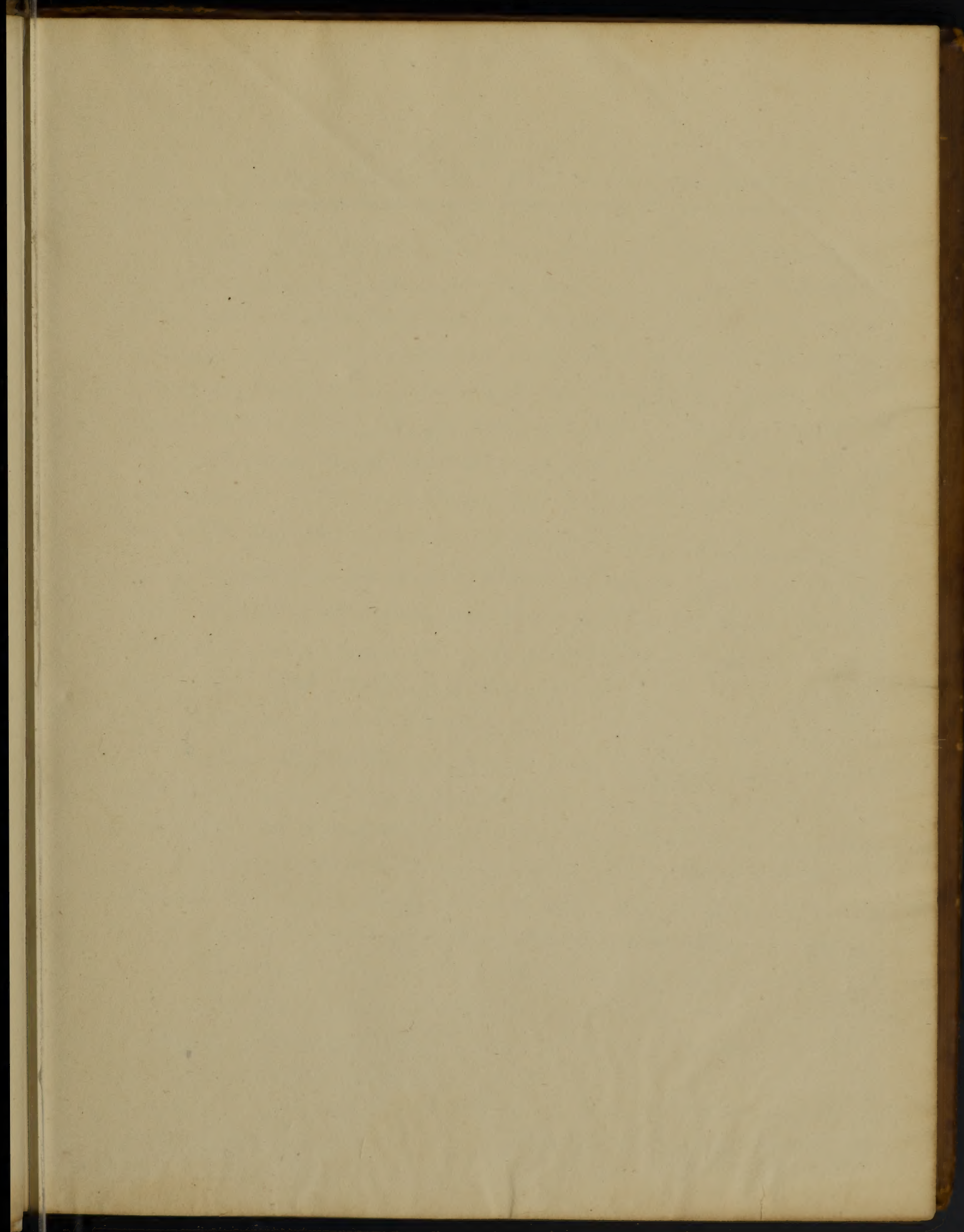
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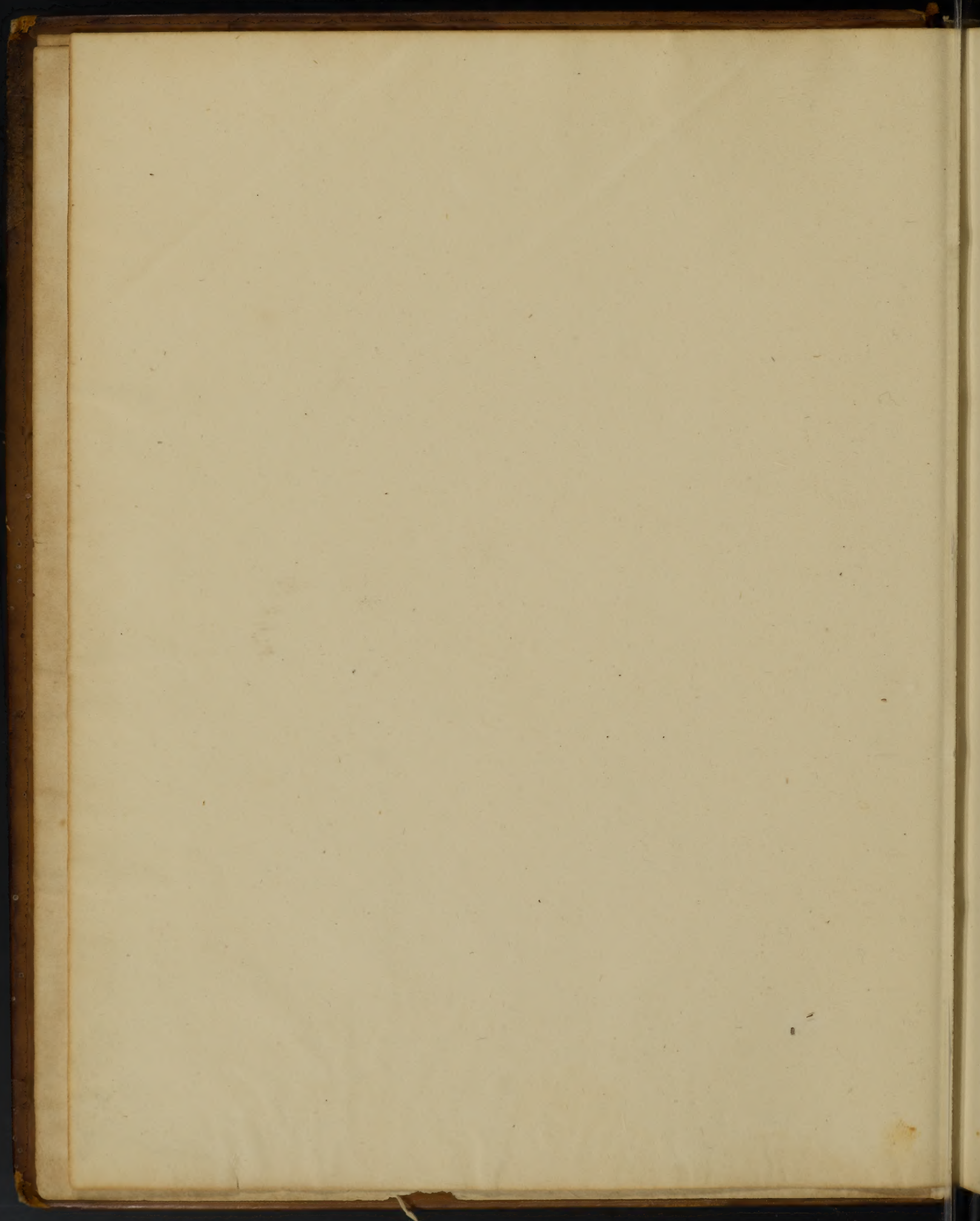












34-893

Of Fraudulent Conveyances.

By Stat. 12. Eliz. & a like Stat. in Conn. all conveyances, bonds, suits, judgments, executions, (Dy. 245. Rob. 589, 20) & contracts made to defraud the creditors of grantor, are, as against those only, who are intended to be defrauded, & their Representatives, successors & assigns, utterly void, (Rob. 2. 2. n. St. Con. 354. 0. 2 Bac. ab. "Fraud" c. p. 601. 2.

Provido in the Engl. Stat. that it shall not extend to any conveyance &c. to any bona fide purchaser, having no notice of the fraud, (Rob. 4. 5. n. 2 Bac. ab. sup.

No such proviso in our Statute.

By Stat. 27. Eliz. all conveyances &c. made to defraud bona fide purchasers are also void, with a similar proviso. (Rob. 7. 8. n. 2 Bac. "Fraud" c. p. 602. 3.

No such Stat. in Conn.

Both these Stats. are said to be in affirmance of the C. L. Corp. 434. 2 Skin. 357. 3 D. R. 546. (Rob. 2. 9. vid. Rob. 30. 116. 526. 8. 573. that fraud must be proved at C. L. & can't be presumed.

Formerly holden to be in affirmance of the C. L. only as to prior creditors & prior purchasers. (Rob. 7. 3 Co. 83. Lane 105. Cro. E. 444. Co. Litt. 290. a. b. 2 Bac. "Fraud" c. vid. Rob. 14. 5. 2 Ark. 501.

But it is now holden otherwise, (at supra.)

Such conveyances are good as between the parties, (Rob. 641. 33. 660. 72. 1000. 104. 489. Dy. 296. 3 D. R. 222. Cro. Jac. 270. Rob. 657. 1 Lu. 333.

Qu. if fraudulent grantor gives his obligation for p. consideration of the conveyance, can it be enforced (Dunn v. Lewis & Co. 1012.

Fraud: Conveyances.

But a fraudulent conveyance within the Statute is void as to a subsequent purchaser for valuable consideration, even if he has ^{no} notice of the prior conveyance. Rob. 16, 17, 39, 214, 5, 233, 5 Co 60, Comp 711, 2, 2 Bro Chy, 148, of East 89, Same rule in Equity (Rob. 233, 2 Bro Chy, 148, 9).

But the propriety of this rule has been doubted. 1 New. N. 335, 2 Bro Chy, 148, of East 71, 4 Cruise 375, 1 Fonb. 271.

It is settled that a fraudulent conveyance to defeat Creditors, is void, as well as subsequent as prior Creditors. Rob 17, 19, 20, 194, 5, Sty. 946, 2 Bro Chy, 90, 1 Atk 94, 2 W. 600, Tidd 69, Black 165, Gutter Ct. of E. 1310, Com. Di. "Convey" 13, 2, 3 Co 329, Dy. 351, 10 Mol. 324.

And a conveyance upon valuable, inadequate consideration will be fraudulent & void, as to Creditors &c, if made with intent to defraud. So of a judgment. Rob 23, 5, 496, 847, 8, 2 W. 10, 2 Atk 520, 3 Co 81, 2 Atk 481, Rob. 27.

In some cases arising under these Statutes, the fraud imputed to the conveyance is actual - in others, only constructive (Post.) But even where actual, it is not necessary that the Creditors &c should have been actually deceived. Suff. that the conveyance was made with intent to defraud & deplete. Rob. 33.

This intent may be inferred from various circumstances (Post.) Thus a voluntary conveyance to A, & a subsequent sale to B, are themselves suff. evidence of fraud in first conveyance. Rob. 33, 5, 4 Cruise 374, 5 Co 60, 149, 5, 16, 334, Am. C. 288, Comp 220, 2 Bro Chy, 148.

If a fraudulent conveyance is defeated by a subsequent sale, & the latter is itself afterwards defeated by non performance of a condition,

Fraud Conveyances.

condition, yet the first is not made good - having been once destroyed by the Stat. 20b. 42. n. 2 Roll. 30.

It was formerly supposed that if a conveyance was made to defraud any particular creditor of the grantor - no other of his creditors could avoid it. 20b. 46. 7. Such a construction having been given to other Stat. in subsequent cases. 20b. 48. 7. 100. 93. 2 Dy. 192. 10 Co. 56.

But it is now well settled, that if a conveyance is made with intent to defraud any one of the grantor's creditors it is void as to all of them - the tendency of a conveyance is to defraud all. 20b. 53. 58. 60. Same, 47. Palm. 415. 2 Bosc. 500.

The grantors being indebted at the time of the conveyance is a badge of fraud under 13 Eliz. Stat. 50, under the 27 Eliz. 20b. 53. 59. 60. Comp. 711. 279. Voluntary.

According to many weighty opinions the want of a valuable consideration is only presumptive evidence of fraud under the Stat. 13 & 27 Eliz. 7 Stat. 30 or fraud. 20b. 61. 13. 15. 18. 395. 56. 15 For. bl. 208. 9. 1 Lev. 150. 237. 193. 2 Lev. 105. 11 Mod. 119. 12b. 486. 2 Vern. 44. Comp. 434. 705.

But it has lately been decided, that a voluntary conveyance as such is fraudulent within the Stat. 27 Eliz. i.e. any conveyance not founded on valuable consideration. Doe v. Sturges. 11 Q. B. 57. 105. See 12 Q. B. 13. 2 Bosc. 10. 2 Vern. 261. 2 Bosc. 1019. 100. 108. 15b. 133. 12 Q. B. 334. 20b. 194. 204. 526. 628.

See whether this last rule holds, as to conveyances under the Stat. 13 Eliz. 20b. 16. 17. 61. 11 Mod. 15. 2 Bosc. 10. 3 Mod. 412. 2 Vern. 327. 1 For. bl. 268. 20b. 190. It seems that it does not, (post) as to subsequent creditors see 20b. 395. 6. full.

For it has been decided, that reasonable family settlements

Fraud, Conveyances.

It is said Compt. M. that the limitations to the collateral relation, in the last case, are good as to Creditors. 20 M. 175. 2 Am. Rob. 23. 5. 4 M. 52. Rob. 113. Conlie. [But are they good as to purchaser as under Stat. 27 Eliz.? Rob. 109. 10. 13. 14. 15. 2 Atk. 190. 2 M. 248. 255. Rob. 123. 5. 142. 147. 164. 162. 2 Am. 105.]

These latter limitations are, however, good, without doubt, as between the parties. Rob. 109. 10. 113. 664. 648. 9. 647. 117. 760 34th. 7 Mod 80. 2 M. 594. 3 Atk. 129. & when executory, may be decreed in Equity.

But a settlement made after marriage, not in pursuance of an agreement before marriage, nor upon a new valuable consideration is considered as voluntary. Rob. 187. 2 M. Compt. 287 2 Bro Chy. 148.

Those such settlements the settlor being unimpaired at the time, have been usually supported as creditors. Rob. 187. 191. 18. 24. 228. n. 2 Atk. 440. 2 Bro. 10. 2 Atk. 525. i.e. subsequent Creditors vid. 2 Atk 600.

But such settlements are treated as to subsequent bona fide purchasers. Rob. 191. 2 Atk. 213. 7 Bro. 158. 2 Am. 146. 2 Am. 326. Compt. 278. 2 Bro Chy. 148. 1 Atk. 624. 3 Am. 467. 1 Bro. Cas. 238. 2 Am. 299. 2 Am. 272. 9 East 59.

Purchasers are more favored in the construction of the Stat. 27 Eliz. than Creditors are by that of 13 Eliz. Rob. 187. 174. 16. 17. 345. 4. 2 Am. 327.

For they advance their money for the property itself, and not on the personal credit of the grantor or owner, as Creditors do. Compt. M. 234. 3 Bro 443. 2 M. 496. 2 Atk. 440. 2 Am. 564.

Now a voluntary settlement by fine or recovery is affected by Stat. 27 Eliz. See, Rob. 205. 213. 3 Co. 79. 2 Atk 254. 1 Bro. 133. 16 L. R. 78. 2 Co. 7. 2 Atk. 423.

Fraud. Conveyances.

But a settlement made after marriage, in pursuance of a covenant or agreement made before marriage, is not regarded as voluntary: & is therefore supported by Creditors & purchasers. (Secondly, if the settlement arises substantially from the prior agreement, Rob. 245, Amb. 288, 2 Lea. 140.) Rob. 218, 243, 1 Eq. Co. ab. 354, 3 Feb. 6. 1 Vent 193, 2 Feb. 700, 3 Wm. 237. - But the agreement may be good, so far as it confirms & exp. orig. invol. agreem. & binds as to the residue. Rob. 247, 1 Vent 205.

For in such cases the original agreement is in consideration of marriage (which is a valuable consid.) and the settlement being in Execution of the agreement, is supported by the same consideration.

The rule is the same, even if the agreement before marriage was by parol. Rob. 220 full. Cro. J. 454, 2 Lea. 248, 1 Vent 196, 2 Wm. 304, Rob. 228, 481, n. 482, 3, 4 Wm. 236, 700 Dec. 1794, 618. (See 6 Wm. 370.)

But if the settlement is not executed after marriage, but only in articles only, & recourse is had to a Ch. of Equity to compel a specific performance, that Ch. will enforce it only as agt. volunteers & Creditors, not as to purchasers & mortgagees without notice. (Rob. 227, 8, 9, n. 230, 1, 2, 41, 2, 2 Wm. 304, 9. (P. W. 622, ...)

For the interposition of the Ch. being discretionary, & the Equity being equal, that Ch. will not deprive a purchaser & mortgagee, without notice, of their legal title. See "Mortgages" p. 301. Rob. 221, Fall 69.

And a settlement after marriage, without any agreement before marriage, & without any other consid. than that of providing for children, is supported both at Law & in Eq. as to subsequent Creditors, provided it is reasonable & unconscionable with any charges of parol. (Rob. 394, 2, 7, 18, 245, 187, 191, 227, 2 Wm. 15, 2 Wm. 202)

But when application is made to a Ch. of Equity to rectify

Fraud? Conveyances.

Settlements made after marriage, in pursuance of the prior agreement, that Ct. will not extend its relief so far, as to defeat a purchaser for valuable consid^{er} without notice. (Rob. 229. n. Am. 288. 10. W. 822. - Because, says Robert) "he is not expected to be conversant of the rules of equity." See.

Setts, where articles, made after marriage, in pursuance of an agreement before, require no correction, & such cases Eq^y will enforce the articles as a purchaser for value, without notice. Where he has notice of the real equity - not so in the last case. (Rob. 233. 4. 2 Chy. Cas. 246.

On the other hand, if a purchaser under articles the for valuable consid^{er} but with notice of a prior vol^u settlement applies to Eq^y for a specific Execution, his bill will be dismissed - for he has not the legal title, & he has no equity. (Rob. 234. 507. n. 16th. Co. 207. - Secus at Law, when he has a conveyance executed, & such, &c.

A recital in an agreement after marriage, of its being made in pursuance of one made before, is, with very slight concomitant facts suff^{ic} evidence of the prior agreement. (Rob. 236. 241. Pre. Ch. 101. 2 ves 304. 2 Ves & P 196. 1 Atk. 188.

A settlement made after marriage, upon a new valuable consid^{er} is not considered voluntary as to Creditors or purchasers. E. g. in consid^{er} of a settlement of wife's property. (Rob. 242. 3. 4. q. 252. 3. 262. 272. 2 Atk 417. Pre Chy 22. 425. 2 Lev. 146. 12th 10. Full 54. 2 Atk. 477. 2 Lev. 70. Pre Chy 113.

So if made in consid^{er} of a portion, given by the friends of the wife. (Rob. 252. Full. 2 ves 18. Ambl. 121. Crof. 158. Full 64. 1 Atk. 16. 188. Pre Chy. 425. 2 Atk. 477.

Nor is it a ground of objection to the settlement in such a case, that the stipulated portion has not been paid. The agreement

Fraud & Conveyances.

It is to give is a valuable Consideration. (Vol. 258. 166. 309.

If a husband being obliged to apply to a Ct. of Eqly. to obtain his wife's fortune, & directed by the Ct. to make a settlement on her, the settlement thus made after marriage is not considered as voluntary. (Vol. 278. 2. 2 Atk. 420. 1 P. W. 350. n. 3 Atk. 305. Good as both Creditors & purchasers. Vol. 288.

The settlement in such case is the means by which he is obliged to purchase the enjoyment of the wife's property. Ergo. not voluntary the after marriage.

And if the trustee of the wife's fortune requires a reasonable settlement on her, as a condition of giving it up to a husband the rule is the same, tho' there is no direct in Eqly. for that purpose. For Eqly. hath prescribed the same condition. (Vol. 280. 5. Prec. Chy. 22. Amb. 176. 1 Atk. 190.

But if the trustee voluntarily & without condition resigns the wife's fortune to the husband or the latter is considered as making a settlement on the wife, during coverture, it is voluntary. (Vol. 281. 2. Prec. Chy. 414. 4 Ves. 18. 2 P. W. 339. 3 W. 11. 166. 532. 2 Atk. 67. 429.

In such cases the settlement is void as to purchasers for value. But is it so, as to Creditors, unless husband was indebted at the time? i.e. is it so, as to subsequent Creditors. It seems not, generally.

But if the settlement required by the trustee, practises exactly what a Ct. of Eqly. wd. deem reasonable, it seems that as to the wife, it wd. be void, even as to Creditors. (Vol. 285. 2 Ves. 17. even as to subsequent Creditors, see ante, p.) (Vol. 349. 6. 27. 1 Chy. C. 59. As to what is a reasonable settlement, see Vol. 285. n. 1 P. W. 549. n. 3 Ves. 307.

And if an estate, in whose hands there is a Legacy belonging to the wife, requires a reasonable settlement on her, as a condition

Fraud. Conveyances.

of paying it to the husband, the settlement is not voluntary.
Rob. 285.8. Sea 234. 2 Co. 18. 2 Atk. 420. F. 548. 3 P. W. 11. It
is good vs creditors & p. husband. Rob. 288. & cas. supra.

If the wife has an equitable title to a chattel real, the husd.
may dispose of it, free from any claim, even in eqty. for a pro-
vision or settlement upon her. Rob. 299. 602.3 1 Vera 7. 18. 1 Chy 603.
306. 2 Vera 270. 3 P. W. 220. 4 Cas. 354. Here equity strictly follows
the Law.

It is, sum, then, that a settlement on the wife, during
coverture, in considⁿ of such a chattel interest, is not voluntary, as
well in eqty as at Law. Rob. 299. & ult.

Conveyances fraudulent as to Husband.

In some cases a disposition of propy. by a woman, to a 3rd
person, or to her own use, on the eve of marriage, is in eqty. fraud.
tvoid ab. the Husd. Rob. 348. 358. 2 P. W. 357. "Husband & wife"

Distinctions: 1. If a woman before a treaty of marriage,
reserves an exclusive dominion over her property, with a
general view to future possible coverture, the husd. having
made no settlement upon her, cannot set it aside even in eqty.
Rob. 348. & ult. 359.) tho he has no notice of it, at the time of mar-
riage. Rob. 354. 2 Bro Chy. 345. 1 Ves f. 22. 2 Ves f. 104. There must be
fraud. 2 Bro Chy. 350. Rob. 354.

Secus (semble) if done pending a treaty of marriage, or in
contemplation of the particular marriage afterwards had.
Rob. 354. 5. 2 Bro Chy. 345. 2 Ch. Ca. 46. 2 Vera 17. 2 Vera 292. 1 Forb. 259.
Fraud in such cases.

But if he has made a proper settlement upon her, in
which a Ct. of eqty. is to judge, he may be relieved by reservation
upon

Fraud. Conveyances.

upon the ground of fraud, inferable, from his want of notice.
(Rob. 259, 2 P. W. 333. Rob. 357.)

Scus, if he had notice.

3. If a woman, in contemplation of pending a treaty of marriage, makes a settlement for the support of her children by a prior marriage, the settlement will be valid as to husb. tho he had no notice. (Rob. 359. 1 Fonbl. 253. 2 P. W. 357. 1000 408. 1 Atk. 265. 2 Bac 292. 1000 408.) Such settlement has been held to be valid as to creditors & purchasers. 1 Atk. 265. (Rob. 360. 365. Du. as to purchasers & ease 59. 00.)

So, tho he has made a settlement on the wife, (Rob. 359. 358. 2 Ch. Cas. 42.)

4. But, if appears the husb. has made a settlement, which was induced by an intentional concealment of the provision for the wife's children, & by false appearances, studiously held out, the settlement for the children may in equity be set aside as fraud upon the husband. Rob. 360. 356. 7. 2 P. W. 533. 2 Ch. Cas. 42.

In all these & similar cases, actual fraud seems necessary to entitle husb. to relief. 2 Bro. Chy. 350. (Rob. 354. 357.)

5. If a woman on the eve of marriage makes a voluntary conveyance to a stranger, it is void in equity as to husb. 1 Fonbl. 259. 4. 2 Ch. R. 41. 2 Bro. 264. 400. (Rob. 353.)

So, a wife has been, in some cases relieved in equity as clandestine agreements of her intended husband, with persons privy to the marriage, in fraud of her reputation. (Rob. 350. 4. 2 P. W. 79. & n. 1. 00. 1000 136. 2 Ch. 101. See "Towers of Chy.")

Fraud. Conveyances.

Who can take advantage of, by Stat. 27 Eliz.

No other than a purchaser bona fide & for valuable consideration can avoid a prior vol. conveyance under s. Stat. 27 Eliz. Rob. 369, 372, 382, 388, 425, 6, 641, 2, 655, 3 Co. 31, Comf. 705, 712, Valt. 84, 2 Wils. 355, Cro. E. 445, 10 Mod. 396, 3 Co. 85.

But marriage is a valuable consideration within s. rule. Part. 3. Rob. 367, 103, 105, 123, 4 Cruise 383, Hurd. 398, 1 Ch. Ca. 49.

Even a trustee to whom a bona fide conveyance is made for payment of grantor's debts take advantage of the Stat. 27 Eliz. to be no such cases. Rob. 369, see 1 R. W. 358, 2 Eq. Ca. 748, pt. 1, 1 R. W. 536, 2 H. 379, 1 Atk. 513, 3 Atk. 22.

A purchaser under a family settlement made in consideration of natural affection cannot set aside a prior vol. conveyance to a mere stranger. Atk. 370, 1, 3 Co. 33, 2 Atk. 233. The former not being a purchaser for value & a vol. conveyance is good as to grantor, his heirs & volunteers. Rob. 33, 641, 1 Root 109, 489, Cro. E. 445.

Same rule, as to a woman claiming a jointure, made after marriage. She cannot take advantage of the Stat. Rob. 371, Cro. E. 445.

But if one purchases for valuable consideration, mere inadequacy of price is no objection to his taking advantage of the Stat. Rob. 371, Finch 104.

But inadequacy of price accompanied with circumstances indicating collusion between the parties, to overturn the prior vol. conveyance may be a sufficient objection. Rob. 371, 641, Comf. 705, 713, 1 Eq. Ca. 108.

Otherwise a purchaser mala fide might take advantage of s. Stat. & binding force of prior vol. conveyance upon grantor himself, might be eluded.

Fraud. Conveyances.

But gross inadequacy of price amounting to only a colourable consid^r. is itself a suff^t objection, for the reasons *supra*. Rob. 373. 2 P. W. 618. Cowp. 713. 4.

So, if a subsequent purchaser for an inadequate consid^r. appears to have over reached the grantor, he cannot avoid a prior voluntary conveyance. This is not a bona fide purchaser. Rob. 372. 8 Co. 83. 6 Cro. 2. 445.

A Mortggee is a "purchaser" within the Stat. & may therefore take advantage of it, if the mortgage is bona fide for valuable consid^r. Rob. 370. Shinn. 423. Holt 477. 2 Burr 272. Cowp. 713. 16 L. Ca. 220. Amb. 287.

So of the conversee of a Stat. a recogniz^{ce}. Rob. 372. 462. n.

But a mortggee being in Egt^y. a purchaser only for the purpose of security & to the extent of his debt, the vol^y. convey^{ce}. whether prior or subseq^t. is void only pro tanto, & therefore the vol^y. purchaser will hold the Egt^y. of redⁿ. This does not interfere with mortggee's claim. Rob. 373. 657. 16 L. Ca. 572. 14. "Mortggs."

It seems, however, that Egt^y. will never open a fore-closure, in favor of a subseq^t. vol^y. purchaser; he being entitled to no favor. Rob. 373. 16 L. Ca. 217. 5 Ed. vid. 3 Finch 38.

It seems, also, that a surety to whom a lease is made for his indemnification, is a "purchaser" within the Stat. (Rob. 374. 2 Roll. 4. 305. 2 Lev. 70.) tho he has not paid the debt. & see 5 Co. 24. Hent. 84 (Rob. 455. n. 2 Inst. 499.

But this rule is said to be questioned. Rob. 374. Dy. 205. a. note. 6 Inst. 38. 2 Roll. 733.

See, is the rule questionable, if the lease is made by way of mortgage?

If it is an absolute lease, it seems to be void in principle.

Fraud^e Conveyances.

Not only because it holds out a false appearance, but also because it is an absolute transfer of property, when the payment of any consid^r for it is altogether contingent. In deed it is a plain secret trust between the parties, on which ground our Sup. Ct. & Ct. of errors have adjudged conveyances to be fraud^e, as was held in *Bank vs Walling*, 10 Ct. of C. See also *W. W. W. v. W. W. W.*, 10 Ct.

To constitute a purchaser within the Stat. the purchase must be of the identical thing or subject, which was the subject of the fraud^e conveyance. Hence, he cannot take advantage of the Stat. (Rob. 375. 60 Stat. 38.)

Thus where A having a lease for 60 years or cond^r forged an absolute lease of same land for 90 years, & for value sold the forged lease (reciting it) & all his interest in the land to B. it was resolved that B. was not a purchaser within the Stat. for he did not contract for the true interest of A. - and tho the true interest passed between the parties by the general words, yet the valuable consid^r did not extend to it.

But if a valuable consid^r is paid, it is immaterial what species of interest is purchased. Whether the subject purchased is an actual positive interest, or the mere extinguishment of an interest. E.g. *Lipson* makes a fraud^e sale, & then, for value surrenders to the reversioner. This latter may void the sale. (Rob. 376.)

A *Lipson* for years, for valuable consid^r is a purchase within the St. & the redemption of rent is a sufficient valuable consideration. (Rob. 376. 2 Vern 327. 2 Bl. Ct. 1010. 6 Cr. 141.)

It has been said, that to render a conveyance fraud^e.

Fraud. Conveyances.

within this Stat. he who makes it must be the same person who afterwards sells to the bona fide purchaser. (Rob. 377, full. Gibbes, 312. see also Mann 45.) What if, be it otherwise, the latter cannot take advantage of the Stat.

This seems to be true in those cases ^{only} in which the person making the latter conveyance has not the estate in himself at the time. (Rob. 382.) or rather when he is a stranger to the estate at the time. (Rob. 374. E.g. Grand-father, father & son. Grandfather made a voluntary conveyance to his grandson, & died. The father then mortgaged the land for valuable consideration. That mortgage is not set aside the voluntary conveyance tho it is. Have been otherwise, if grand-father had made the mortgage, - for the father was a stranger to the estate at the time it having passed to the grandson. Mann 45. (Rob. 377, 382.)

But if the person making the subsequent conveyance tho. not the same as made the prior vol. conveyance, has the estate in him at the time the subseq. purchaser may take advantage of the Stat. (Rob. 379, 382, 385. E.g. Grand father, father & son. Grandfather made a voluntary conveyance to his son, & died. The father then sold to a bona fide purchaser. That the lease & assignment were both void as to the purchaser. (Rob. 372, (Rob. 377, full. For here the father had the fee simple by descent at the time, not a stranger.) Rob. 380.

But if A. makes a fraudulent conveyance to B. & then makes a vol. conveyance to C. & C. sells to D. for valuable consideration D. cannot avoid the first fraudulent conveyance - for C. took no estate, even as between A. & himself. Hence his sale to D. was the act of a stranger to the estate. (Rob. 383, 4. Moore 402, 533, 535. 113. (Rob. 378, 658. 3 Ch. Co. 123. 2 Mann 473. And in this case, it is not material whether C. knew of the first fraudulent conveyance or not. 100 385. Moore 533.

Fraud & Conveyances.

A trustee under a vol^y settlement cannot become a bona fide purchaser, within the Stat. so as to defeat the settlement in Equity. Rob. 389, vin ab. tit. "Fraud" vol. 13, p. 527, 38. 10. 222.

For he cannot acquire a right in Equ^y by a breach of trust, - he does not act bona fide.

And if a trustee, by direction of cestui que trust, makes a vol^y convey^{ce}, he cannot without the direction of cestui que trust, defeat^d in Equ^y by a subsequent sale to a purchaser, even without notice. Rob. 389, 40. 500. Finch R. 437, vin ab. tit. "Fraud" vol. 13, p. 527. Moore 757.

For the first conveyance is in Equ^y a sale by the cestui que trust, & the latter being a breach of trust, is disconnected with it, & thus is regarded in Equ^y made by a stranger to the trust. Rob. 390.

But a person who makes a purchase in his own name, with the money & for the use of another, is a purchaser within the Stat. Rob. 391. May 105.

For he acts in pursuance of the trust & takes advantage of the Stat. for the benefit of the cestui que trust.

A person purchasing any rent or profit out of land, may be a purchaser within the Stat. (Rob. 391. 2.) E.g. Purchase of tithes growing Rob. 393. 4. Bull 22, vin ab. tit. "vol^y Convey^{ce}" p. 2.

Same rule in favor of all incumbrancers. (Rob. 392. Bro C. 551. Ward 173. Bridgm. 22. E.g. Conveyance of a Stat. or conveyance. Rob. 462. &c.)

Fraud & Conventions.

Voluntary gifts of money & under Stat. 1849 & 1852.

When there is a voluntary gift of money, or of other personal effects, if it is consumed or paid away by fraudulent means, it is not to be found before the creditor can take it in view. His remedy as to that property is gone in Eng. for the only way in which he can set aside the gift is by bringing upon his O. P. R. (Rob. 223, 224, 1 Day, 255.)

And some say cannot in such a case, supply a remedy. (Rob. 224.)

In Con. the creditor may secure a lien upon it, by an attachment or mesne process. But if it is consumed or gone before attachment, the remedy, here, is gone - for no action for damages will lie wth donee. 1 Day, 255.

Both here & in Eng. however, the creditor may in all cases, prosecute for the penalty of the Stat. (Rob. 224, 225, 235.)

And there is a similar penalty provided for purchasers by Stat. 27 Eliz. (Rob. 7, 2.)

And it seems by some opinions, that a voluntary gift of money, for the reason supra, is not within the Stat. 1849 & 1852. (Rob. 424, viz. ab. Fraud & 1 Eq. C. ab. 149, 2 con. 470.)

Qu. If the specific money can be found in p. hands of the donee what is the objection to its being taken in view?

Consid.ⁿ Premium Padoris. In case of seduction, &c., the seducer by way of reparation gives a bond, it is void in Eng. as wth creditors the good between the parties. (Rob. 428, 487, 2 Con. 334, 3 P. W. 339, 222, Talb. 103, 2 Eq. C. ab. 182, 183, 255, 256, 257, 258.)

And hence it is seen that a conveyance for such consideration, be void at Law under the Stat. 1849 & 1852, as wth creditors & purchasers, if for value. (Rob. 428.)

Fraud Conveyances.

Consignⁿ / paym^t of debts.

A conveyance to trustees for payment of debts, no creditor being a party to it, is said to be void as to dissenting creditors & bona fide purchasers. Rob. 429, 437. 1 Leon. 194. 1 Ch. Ca. 249. 2 Vern 510. (2a.)

It is deemed void (y. Somb) Rob. 429, 430. because the trustee is a stranger to the valuable considⁿ. 2a. are not the creditors presumed to assent till the contrary appears?

But, if a creditor is party to such conveyⁿ to trustees, it is supported by a valuable considⁿ. (Rob. 431, 6. 36. 21. 5 V. R. 420. *) & is good as to a creditor not included in it. Rob. 436. 5 T. R. 420, 426, 530. Wailor v. Huntington Ct. of E. 1811. (Wailor v. Fiddick Ct. of E. June 1811 Contra 3 Day 340. 2 Johns. 226. 1 R. 156. 5 R. 413. (*). 1 Bur. 478. 8 T. R. 521. 5 T. R. 235. 4 R. 167. 1 Binney 502. 1 Camp. 148. 2 Nott & T. R. 42. Doug 671. n.

Now is this conveyⁿ good, except as to the creditor who is a party to it, if the former rule is correct. see 80 R. 508, 530. 4 East. 1. -

A conveyⁿ to trustees, for paym^t of debts, made in a neighboring state, by the laws of which it is good as to dissenting creditors will be so in this State. The lex loci governs. Wailor v. Huntington Ct. of E. Nov. 1811. 3 Dall 370. 2 Mass. 7 R. 89. 1 Root & P. 138. 1 R. R. 665. 4 T. R. 182. 2 Bur. 950. 1 R. R. 258. Comp. 176. 343. 1 N. Y. T. R. 402. 2 Vern 540. 3 Brand 73. Sw. Ev. 258. 5 East 120.

And such a conveyⁿ for paym^t of debts as is valid according to the foregoing rules, is so if it seems, tho the debts are barred by the Stat. of Limitations. Rob. 432. 2.

For the remedy only is taken away by the Stat. Comp. 548. 5 Bur 2630. 3 Kay 389, 420, 741. 1101. Kirk. 303. 3 Bur 157.

Fraud. Conveyances

And (scilicet) the conveyance ipso facto revives the remedy.
Gough, 52 G. 2 Bur. 1094. Exp. D. 152. 3 Ct. R. 454. 2 Rb. R. 340.

And if, after a conveyance to trustee, without p. privacy of any creditor, the creditors included in the trust, being a trust in Eq. & to trustee for performance of the trust (which in general will be granted of course, 3 P. W. 222) the donor validates the conveyance at instance Rob. 439. 1 Ct. R. 33.

For the conveyance thus receives the sanction of a Court of competent jurisdiction & to set aside the conveyance is to impugn the decree. Qu.

To charitable uses. Donations to Charitable uses are void, as to creditors, if the donor is indebted at p. time.
Rob. 438. 1 P. W. 285. 421. 675. 1 Vera 230.

Qu. are they void if the donor was not indebted at the time? i.e. void as to subseq. creditors? scilicet. Rob. 438.

And a purchaser, for valuable consideration with notice cannot set them aside, as may common v. b. Conveyances. (Rob. 439. Duke 64.) by construction of Stat. 43 Eliz.

Donatio causa mortis. A donatio causa mortis must, in principle, be void as to donors creditors. Rob. 442. 4 Rep. 2. 1 P. W. 406. vid. Sta. 777. 2 v. 5 p. 111.

As to claims arising ex maleficio. It has been determined in Eq. that a conveyance to trustee, for payment of debts, was not void as to a p. in an action arising, ex delicto: tho made pending the suit, & with the professed intention of defrauding p. of his damages. Rob. 454. 573. 4. Eq. Cab. 149. See Stat. 578. 1 Vera 459. - Because if made between just & equal, so holden even at C. R. Rob. 579. 4. 7. See 1 Leon. 4.

Fraud^e. Conveyances.

It seems however that a convey^{ce} for any other than a valuable consid^r. is not, in such case, bigood as the p^{er}ff. Rob. 457. 8.

Claims arising on Covenant. But, it seems, yet a vol^y. settlement made between the dates, & the breach of a covenant, giving a right to damages only, is not void as vs covenantee, unless actual fraud appears. Rob. 460. 1 Pre. Chy. 377. for there is no present debt or duty.

Purchase in anothers name. - If one procures an estate to be conveyed to another, originally, (as to a joint^r) instead of himself, it is not void as vs his creditors, (thus under the Bankrupt Law, Rob. 494. 2. 1 alk. 94.) or purchasers under him, unless the convey^{ce} appears to have been in trust for him. Rob. 453. 7. 466. n. Cro E. 550. 2. Trin. 6th Term 2. a. 2. 2 Burn 490. 2. 2. 70.

So holden (i.e. not to be fraud^e.) tho the father lets the p^{er}ff. & took the profits, during the sons minority. - For he is considered as acting in the character of guardian. Rob. 468. n. 2 Chy. Ca. 231. 1 P. W. 111. 2. 2. 2. 2. ab. 415. 3. 1 P. W. 608.

So, if the father continues to enjoy after the sons full age. Rob. 467. n. 1 P. W. 607. 8. for that w^o shew a trust for the father.

Power in anothers right. In general, if one has a mere power over property in anothers right, a convey^{ce} of it by the former, tho indebted at the time, cannot be paid as vs his creditors. - e.g. Hus^d. sells a term in right of his wife, as ex^t. Rob. 467. 8. Cro E. 291. - for it is not a disposition of his property.

Qu. as to purchasers bona fide.

Franklin, Conn. 1850

Secondly, if he concurs in trust for hims^{lf}, or to be disposed of, as he sh^d. appoint - for this w^d. give him an equitable interest. & if he sh^d. make a vol^y. appointment, which w^d. be a vol^y. convey^{ce}. of this equitable interest it w^d. be void as to his Creditors. Rob: 470. 1. 2. v. 287.

Colly. appointments. And whenever one, having a general power of appointment over property, makes a colly. appointment: it is in eqly deemed fraud: as was his creditor.

For he may make it his own, as he has this night,
pulling it into other hands without consid. or consid. friend.

Secus, if the power is species. Rob. 475. b.

Wolff. Bonds. The validity of wolff. bonds is more frequently tried in Eng^y. than at Law: for the wolff. obligor takes obligors prop^y, in view there is no opportunity in obligors life-time, for obligors creditors to dispute the claim at Law. 106. 474. 17. 10th. 293. Burned. 347.

But in Eqly a voly, bond uiles resting maulin
cont. may be, posponed to debts founded on valable cond.
 Ob. 478. Ch. 17, 1st 2nd 3rd. Ch. 17, 370.

After obligors death, however, the De. may in ma-
ny cases be tried at Law. E.g. By Exors pleading a bond
outstanding to Testator. Rob. 479. 480. As to the mode of
an Exors pleading a bond outstanding &c. see Rob. 480. n.
Croff. 8. 30. Sid. m. d. 4 Co. 109. Croff. 132. 425. 1 Brownl 50.

But, usually when the claims rest merely in cont.
the Ins. is tried in Eqly being complicated with matters of
discovery &c. &c. Dec. 4th.

A band remaining in the possession of the aborigines

Fraud. Conveyances.

is a very strong badge of fraud. Rob. 480. 5. 656. 7. An. 61. 370. 2 Eq. Cab. 256. Pre Ch. 182. 1 Atk. 625. 10. W. 577. e.g. Tho. this gave a bond to his daughter, but retained the property till his death. void as to creditors.

But such bonds are in general good as to mere volunteers, as legatees, & are not to be disputed by them, unless it is, to preserve the assets for creditors. Rob. 488. 486. 643. 1 Atk. 625. 1 Vern. 427.

And where a vol'y bond has been delivered up to be cancelled, a debt of Eq. has under special circumstances, decreed performance of it by volunteers. Rob. 486. 7. 1 Vern. 427. Eq. ab. 87. e.g. vol'y bond after marriage to settle a jointure - the jointure being settled, & bond was given up, jointure afterwards failed.

Rule of Eq. that if one claims on a bond for money lent, & fails to prove that consid^r. he cannot afterwards set it up as a vol'y bond on meritorious consid^r. - Rob. 488. 1 Atk. 294. vid. Rob. 478.

Vol'y. judg^t. If a bond, or other obligation is vol'y, a judg^t confessed upon it will be so. Rob. 489. 490. Pre Ch. 17. 2 Vern. 202.

If a judg^t by confession is claimed to be fraudulent, & plaintiff in the judg^t must prove a just debt. But if obtained by trial, the onus probandi is on the other side. Rob. 489. 90. 1 Boll. 327.

But the mere preference of one creditor to another does not make a judg^t a conveyance fraudulent under the Stat. 13 Eliz. Rob. 490. 1. 436*. But the debtors Eq^y can prefer only as between creditors of equal degree. Rob. 494. 1 Atk. 690. Vent. 329. 5 Atk. 235. 420. 3 Day 340. 2 Johns. 228.] Tho.

Fraud: Conveyances.

Tho a rule somewhat different has been introduced by the policy of the Bankrupt laws in Eng? (Rob. 492. 8 n. Cook D.S. 85. 1 Bur. 407, 417. Doug 282. Comp 629. 30. W. 298. 1 Bro Ch. 160.)

Consider ex post facto. A conveyance void in its creation may become good in favor of a bona fide purchaser, by matter ex post facto. (Sid. 133. Rob. 495.) e.g. J. S. makes a fraudulent conveyance. A conveys to B. a bona fide purchaser without notice of the fraud. J. S. then conveys to C. B. will hold vs C. (1 Sid. 133. Rob. 495. 8. 500. Holt. 477. 18 W. 443. Shinn. 423. 3 Lev. 387. Comb. 222. 249. 1 East 95. 20 Bac. 007. Sugd. 438. 1 New R. 332.)

Within the proviso in the Stat. 27 Eliz. (Rob. 497. Holt. 477. 1 Sid. 133. Rob. 502. 3.)

The rule seems to be the same as vs Creditors under the Stat. 13 Eliz. Sugd. 437. 9 W. 3. 190 Rob. 497. Godd. 161. See p. proviso to Stat. 13 Eliz. (Rob. 495.) that the Stat. shall not extend to conveyances bona fide. (Rob. 502. 3.)

No such proviso in our Stat.

Hence it has been held in Con. that p. creditors of grantor, may set aside the conveyance made by fraudulent grantor to the bona fide purchaser. Piston v. Crofoot. D.C. & C. 7. 1816. By 6 Judges vs 3.

Sid. 2u. See Holt's reasoning. Holt's 477. Comb. 249. & Gordon v. Gordon. T. C. 1809.

Under the Stat. 27 Eliz. a valuable Consideration whenever it accrues, entirely obliterates the fraud so that it can never again affect the transaction. (Rob. 497.)

Thus a purchaser for value of fraudulent grantor will hold,

Fraud. Conveyances.

holds as bona fide purchasers from the orig. grantor. Rob. 497.

So will the vol'y. grantee, of a purchase for value, & he may avoid a prior vol'y. convey. by the original grantor. Rob. 497. 8.

In some cases of marriage settlement, a conveyance ^{to support a conveyance originally voluntary} is considered as post facto has been held sufficient as a bona fide purchase for value. Rob. 503.

Thus where one, having been long in poss. under a vol'y. conveyance, enters into a treaty of marriage, & the other party to the marriage, trusting in his appearance of ownership, is induced by it to consent to the marriage & accept a settlement of the property. The settlement has been adjudged to be good as a purchase under the original grantor. Rob. 503. 516. 1 Sid. 133. 2 W. Lb. 275. 377. Comf. 705.

But & contraw, a conveyance originally good, cannot become fraudulent by matter ex post facto; e.g. A bona fide mortgage permits mortgagee to remain a long time, in poss. The mortgage is not thus made fraudulent. Rob. 517. 8. Comf. 455. Sheph. T. 65. 2 Bulstr. 225.

But a fraudulent grant can never be legitimized, in favor of the fraudulent grantee by lapse of time, or length of poss. This poss. under the fraudulent deed, does not ex-
tend him to the benefit of the Stat. of limitations. Rob. 521. Bulb. 50. Black v. Callin, 3 C. & C. 1810. 1 Monb. 322.

Construction of Stat. The Stat. 13 & 27 Eliz. like all other Stat. as fraud are to be construed liberally - i.e. so far as they aid upon the fraudulent transaction they are so construed, to enlarge the remedy. If tenant for life commits a forfeiture, that the reversioner, who is privy to p. design, may
(see ante next pa. 51)

Fraud: Conveyances.

may enter & defeat tenants creditors. the creditors may avoid the forfeiture, as paid? (Rob. 590. 1001 257.) See paid? judgments & debts as well as grants. (Rob. 589. p. 12.) (Rob. 542. 1001 88. 26082. Plow. 89. 78. 160131. Rob. 73. 5077.)

See also the penal part. 1001 88.

Badges of fraud The signs or badges of fraud, usually enumerated, especially under the Stat. 13 Eliz. are the following: (Rob. 81. Moore 638. Rob. 540. 585.)

1. The grants being general - of all the grantors prop.
2. Not remaining in possession -
3. Being made in secret, (Rob. 589.)
4. Being made pending a suit in respect of grants. (Rob. 573. 1001 489.)
5. There being ~~an~~ apparent trust between the parties.
6. Suspicious laudis: e.g. that it is made honestly -
7. Made in the absence of the grantee.
8. Grants retaining the debt -
9. His being indebted in debt -
10. Clauses of revocation. (Rob. 611. 541.) - There may however be many others. the marks of fraud being indefinitely various.

All other badges, however, are important in general, only as they tend to prove the 8th i.e. a trust between the parties - Hence, when the conveyance of the grant is for valuable consideration intended as a real disposition between the parties, & not merely ostensible.

Of these badges of fraud, proof by grantor after an absolute conveyance is one of the plainest strongest. (Rob. 543. 585. 571. 4197. 200. 1001 020. 1001 180. 1001 245. 456. 1001 66. 1001 252. 7. 1001 207.)

Fraud^t Conveyances.

Especially if accompanied with acts of ownership. Rob. 548. q. 555.

For the possⁿ being inconsistent with the purpose of the conveyance evinces a trust. Rob. 197. q. 200. 517. q. 548. 558.

But such possⁿ is not altogether so strong a badge of fraud; when the subject of the conveyance is land as when it consists of personal Chattels - for title to the former is to be sought in the title deeds - to the latter in the possⁿ. Rob. 549.

Possⁿ of the title deeds by grantee, is however very cogent evidence of fraud as is possⁿ of the land if accompanied with acts of ownership. Rob. 551. 554. 5.

Such possⁿ is almost uncontrollable evidence of fraud. Rob. 555.

Where land is the subject however, possⁿ by grantee is only evidence of fraud & may therefore be explained as as to rebut the presumption. e.g. If one, having conveyed to a trustee, for payment of debts, is left in possⁿ, as bailiff. Rob. 555.

But it has been holden that possⁿ of goods by vendor, after an absolute sale, makes the sale fraudulent in point of law - i.e. it is per se fraudulent independently of any fraudulent intent. (2 B. & C. 587. 595. Rob. 553. 4. 558. Per Ch. 287. 2 Bull. 225) & as such, void to creditors.

See, too, whether it is anything more than a badge of fraud. 1 Johns. Ca. 156. (Rob. 553. 571. 3 Co. 81. Corp. 432. 1 Will. 44. 2 Bos & P. 82. Bull. 258.) Decided both ways by our S. C. - but according to the current of our auths. it is only a badge of fraud. (see Bailment.)

But however the last rule may be, it is clear, that

Fraud: Conveyances.

if immediate actual delivery of goods is impossible the want of it is no badge of fraud. E.g. Sale of a Ship, or cargo at sea. Rob. 550. 1 Atk 160. 2 T.R. 462. Esp. D. 542. 568. 1205 354. 361. 366. Sel. N.P. 197. 220. 242. 3. 7 T.R. 71. 1 Bur. 478. 2 T.R. 485. 491. 1 Bro Ch. 125.

In such cases the sale is good, not only under the Stat. 13 Eliz. but also under the Stat. 21 Jac. 1. concerning Bankrupts. (See "Bailements")

And where immediate manual delivery must be attended with great inconvenience, the want of it, is no badge of fraud. Symbolical delivery is suff. e.g. Sale of Goods in a ware house, delivery of the keys suff. Rob. 550. 1 Atk 170. 7 T.R. 71. Sel. N.P. 220.

And where grantor's possⁿ is consist^t with the deed of convey^{ce} it is no badge of fraud. E.g. Deed of land on a condition precedent - as the possⁿ does not contradict. (Rob. 557. 548. 479. 561. 2 Bur. 225. 2 T.R. 594.) - the deed, ^{So of mortgages -} there is no presumption of a trust. (Rob. 557. 197. 9. 200. 517. 9. Bro Ch. 485. Shipt. 65. the mortgage being but a security & mortgagor usually retaining possⁿ. - So as to sales of goods on condition precedent under Stat. 13 Eliz. Rob. 561. 2 T.R. 594m. 1205 365. 369. Pre Ch. 287.

Secus, as to mortgages of goods under Stat. 21 Jac. 1. The provisions of this Stat. being intended to remedy the evils of false credit, without regard to fraud. Rob. 557. 556. 552. 1 Atk 160. 205 348. 1005 260. Esp. D. 556. 1205 244. Sel. 226. Bailement.

The conveyances being made, pending a suit for a debt, as grantor is a badge of fraud under Stat. 13 Eliz. (the not so pending) at C.S. (Rob. 573. 8. 1 Leon. 47. Dy. 295. 11 Mod. 549.) Same rule, if the suit pending, is in Equity. Rob. 573. 1205 459.

Fraud: Conveyances.

And a conveyance after a judgment has been had as granted, & before satisfaction has always been consid^d. as a badge of fraud. Rob. 578. q. bin. "Fraud" 2. pl. 3. Dougl. 88. 1 Vern 460.

But if one purchases for a full price, with notice, that grantor is indebted by bond or other contract, his title is not affected by the notice, even in Eqly. Rob. 579. note h.

Under the Stat. 13 Eliz. if one conveys his land with the intent to commit a forfeiture, & then commits a felony, the land will be forfeited. Rob. 582. Moll. 34. bin. "Fraud" A. pl. 1. 3 Co 82. Skin. 357. Lane, 34.

So if the grant is vol^y & the crime is committed shortly afterwards, the influence of fraud will prevail. Rob. 582.

The word "forfeiture" is not in our Stat. Stat. C. 355.

How avoided - The party taking the benefit of the Stat. has a right to treat the fraud^d. convey^{ce} as void - i.e. as if the convey^{ce} had never been made. Rob. 591. 5. 8. Dy. 295. Cro. E. 232. 2. Mol. C. 173. The prop^y is consid^d. as to creditors as part of grantors estates.

Thus when to a writ of formedon as fraud^d. grantor, he pleaded non-tenure, it being found that he had conveyed to defraud those, who had cause of action for the land, judgment was given vs him upon Stat. 13 Eliz. Cro. E. 232. Rob. 591. 5. 96. & see 3 Co 78. Dy. 295. - Considered in Law (as vs those, who are intended to be protected by the Stat.) as no conveyance, & to be so treated, in pleading. Rob. 597. Rob. 72. Cro. E. 232. Rob. 603. 5 Co 80. Eq. divided on not^y.? "ffects on not^y". Dy. 147. a. n. post.

So in a common case of a convey^{ce} to defraud creditors, a creditor having obtained judgment & execution, seizes the prop^y in execution, & grantors, tho in judgment of fraud^d. grantor. Rob. 591. 2. 595. Cro. E. 810. 2. 2.

2
Fraud. Conveyances.

And if one, having made a fraud. sale of goods or chattels dies intestate, the property is consid^d as assets for y. pay^t of his debts. as if he had died in possⁿ of it. Rob. 592. 3. 5. Cro. E. 310. 2 Mol. St. 79.

And in Eng^d may be taken on ex^{or} upon judg^t reco^d.

In Con. the real prop^y of a person deceased is never taken on ex^{or} for his debts. I conclude. It is said to be in the order of y. Ct. of Probate. H. C. 267. 276. Hence, in y. course, I conclude, must be for the ex^{or} to pursue y. remedy for the credits (Post). Tho his personal assets may be taken. As decided formerly by S. Ct. 10 id. 2 Sw. 282.

But in Eng^d if one dies after a fraud. convey^e of his real property, his creditors by simple contract. cannot take the property on ex^{or}. for such contracts bind the personal assets only. Rob. 592. 2 Mc. 243. 275. 3 H. 430. Dougl 93. 3 Bur 250 all. Seem as to creditors by specialty. Rob. 598. Poph 66. Pe 62. 521. And in action vs the heir, proof that the ancestor's convey^e was fraud^t. supports the assumption of assets by descent. Rob 603. 5 Co 60. Rob. 597. Rob. 72. Cro. E. 200. ante.) Dy. 149. a. v.

Under the Stat. 13 Ed. the fraud^t. purchaser of goods if he takes possⁿ after the death of the donor may in some cases, be charged as ex^{or} de son test. i.e. as a stranger in turn adding. Rob. 593. Cro. E. 271. Yelv. 147. 2 Leon. 223. 2 S. 2. 587.

Rule: If he obtains the goods by the permission of vendors ex^{or}, he may be thus charged by the creditors. Rob 593. 4. Cro. E. 271. 3 Leon. 57. 2 S. 2. 587. 1 Bull. 253. (Is not y. reason of this rule, that the rightful ex^{or} is in law, a stranger to the goods fraudulently sold? & thus, as to them, unable to give notice in law? - So if he takes possⁿ after vendors death, but before

Fraud. Bonocyanus.

probate of the will, or administration granted he may be thus charged. Rob. 594.5. 2 T. 587. Qu. Can there be an *Exor de son tort* in Con. where j. estate is insolvent? St. 264. § 6.

But if he takes them, without permission after probate or adm^t. granted, he is a trespasser & *Exor de son tort* may be subjected as such. Somb. (Qu. Bull. 258. Cro. J. 270. Esp. D. 542. Cro. E. 810. Rob. 594.

For in such cases, there can be no *Exor de son tort*, Rob. 593. 5 Co 33. Salk 313. pl. 19. Qu. as the sale is regularly binding on the *Exor* might he not be consid^d. as a stranger to the goods, fraudulently sold, & thus the vendor be considered *Exor de son tort*.

For tho a fraud^t. sale regularly binds vendor & his Rep^s (Rob. 643. 7. 557. y^e. the *Exor de son tort* may claim it, for the benefit of creditors, Somb.) Cro. E. 810. see Rob. 485. 6. 643. 661. Cro. J. 270.

This was formerly so decided in Con. & has often been recognized by S. Ct.

This course is therefore perhaps a proper one to be taken in C. (ante.) i.e. where the donee takes j. goods, without permission, after probate or adm^t. granted, or after donor's death, & before adm^t. granted ^{or after donor's death, & before adm^t. granted} (and 2 Bac 439.) For the *Exor* may bring *habeas*, if he can claim at all. - or where the goods are delivered by fraud^t. vendor in his lifetime - (they may be taken on *Exor* by the Creditor, Somb. 2 Sw. 281. 7.

But what must be the course here, if taken in permission of *Exor de son tort* for *Exor* the once possessor, cannot claim them as his own delivery.

In this case, is there any remedy in Con. except

Fraud. Conveyances.

in Equity? unless the goods are seized in Exec. by J. Creditors?

And suppose the property to be real - is not a bill in Chy. the only substantial remedy? For who would buy it, under an order of sale by Probate? And it cannot, I suppose be taken on Exec. antep.

If a heir makes a fraud. conveyance of an estate descended, to defeat the Creditors of his ancestor - the conveyance is void under the Stat. (13 & 22. Rob. 601. 2 Leon. ii. 3. 600. Moor. 441. Popl. 155.) tho the debt is not originally his own same rule, as to fraud. sales by Exors. Rob 601. Cro. 405. Rob. 609. n.

As to the effect of a bona fide conveyance by the debtor {
heir at C.S. & under J. Stat. 3 & 4 Mod. & 11. vid Rob. 600. 14. 9 n.

And a Ct. of Eqly will in such cases pursue J. appts specifically, in the hands of the fraud. vendee (Rob 609. n. 2 Leon. 416.) & treat him as trustee to the creditors.

Seems both at Law & in Eqly if the vendee is a bona fide purchaser - in such cases the only remedy of J. creditors, is as the Exor. 1st Ch. 463. Rob 609. n. 3 P. W. 149.

And if Creditors or even next of kin can prove collusion between heir & the debtors of the Estate, to diminish the appts, they may by a bill in Eq. prevent the payt. of the debts to the Exor. Rob. 610. n. 4. 610 f. 651.

How far binders are the party &c. - if fraud. conveyance is binding upon the grantor, his Rep's. & those who claim as volunteers under him - e.g. as his heirs, exors &c. Rob. 641. 4. 104. 439. 057. Cro. f. 270. 9. 1102 30. see Rob. 100. 2 P. W. 222. & C. 12. Moore 169. 2 Lew. 333.

Same rule in Eq. as to executory conveyances (Rob 641. 9. 1102 30.)

But

Fraud. Conveyances.

But vol^y executory agreements, are not in general enforced in Equity. Rob. 660. New C. 341. 2 P. W. 248. 1 Ves. 51. Ambl. 406. 2 Pow. C. 16. 3 Bro. Ch. 12. (3 Day 402) post.

And where on the death of a grantor was granted to B. who, pending a suit for the refusal of his letters of administration sold the estate, the sale was held to be valid as vs the Admin^{or}. afterwards appointed. Rob. 644. 5. 660 18.

And where the grantor himself attempts by a collateral act (as by destroying the deed) to defeat a vol^y conveyance, Eqly. will, in some cases, interfere to him. Rob. 648. 1 Eq. Cab. 68. see Rob. 652. 3. ⁴⁵ 2 Ves. 59. 1 P. W. 577.

And no one can defeat his own fraud^{ul} conveyance by his last will, even for the pay^t. of debts. the former being binding upon him. Rob. 649. 652. 4. 12 Ves. 100. 464. 132. 1 Atk. 625. - see vid. Rob. 655. 6. P. Ch. 182. Ambl. 264.

So where one having made a vol^y settlement on his wife afterwards cancelled the deed. it was held to bind him in Eqly. Rob. 652. P. Ch. 235.

But any equitable interest, remaining in the fraud^{ul} grantor may pass by a subseq^t. vol^y disposition - e.g. Fraud^{ul} mortgage to a subseq^t. vol^y. convey^{ance} of the Eqly. of Redn. Rob. 657. 373.

So if the fraud^{ul}. convey^{ance} had been before or after a bona fide mortgage (ante).

And if a deed has been unduly obtained, relief may be had to it in Eqly. by a person claiming under it. will of grantor. Rob. 658. P. Ch. 142. 2 Eq. Cab. 86. 260. 371. 479.

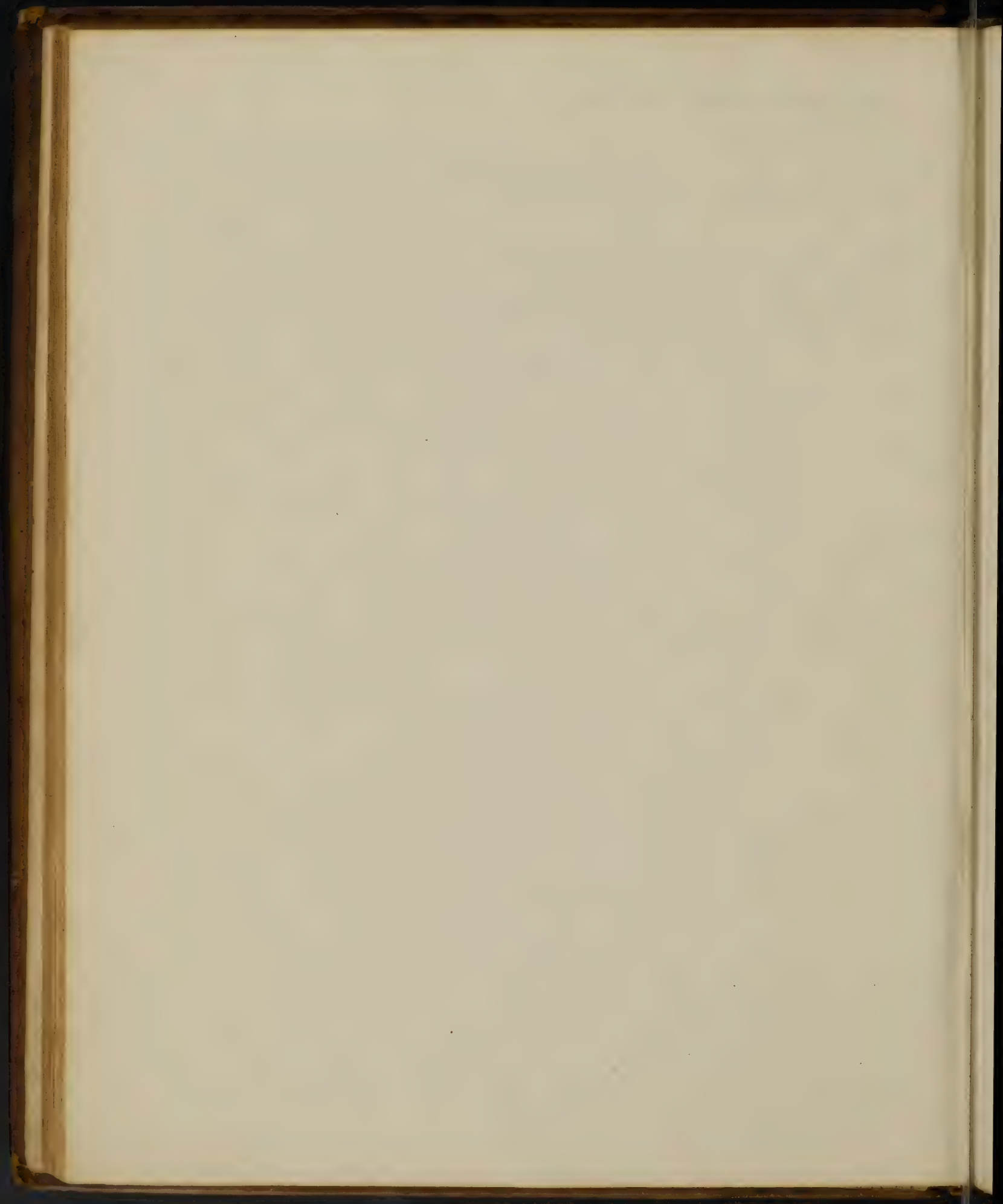
And a vol^y bond for a sum certain is good in Eqly. if it does not interfere with the claims of bona fide

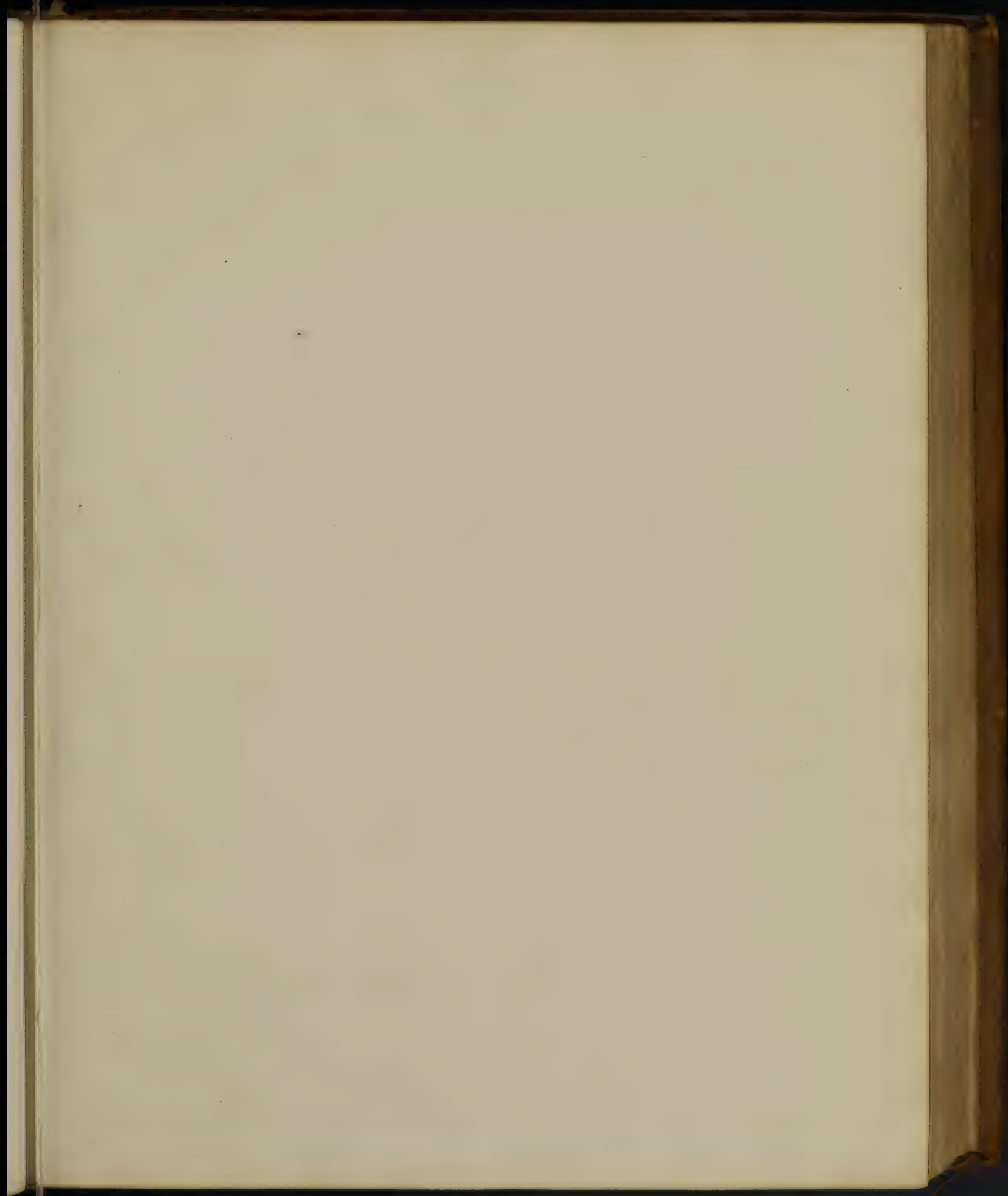
Fraud^t. Conveyances.

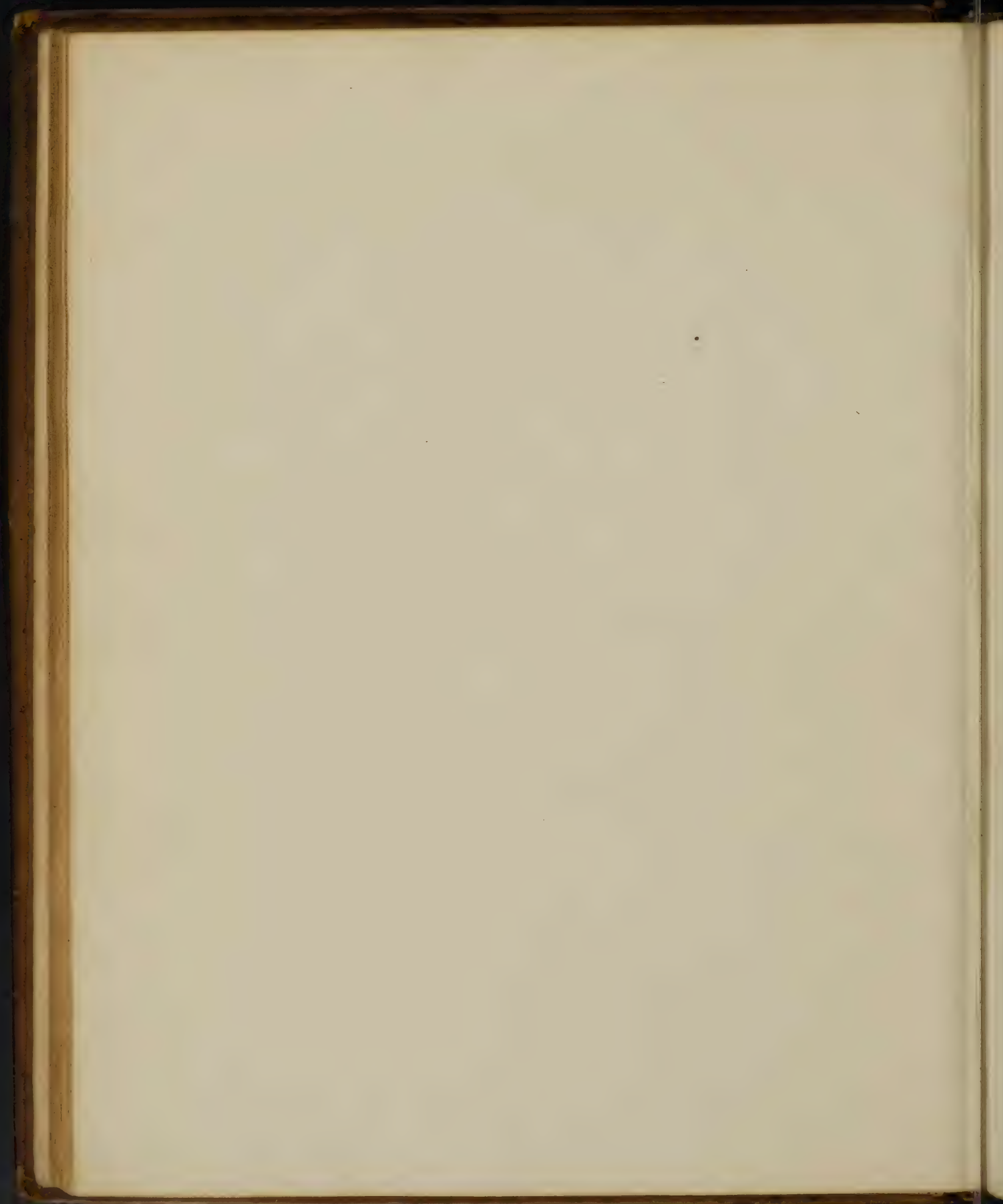
fraudulent Rob. 661. 2 D. 222. 1415 54.

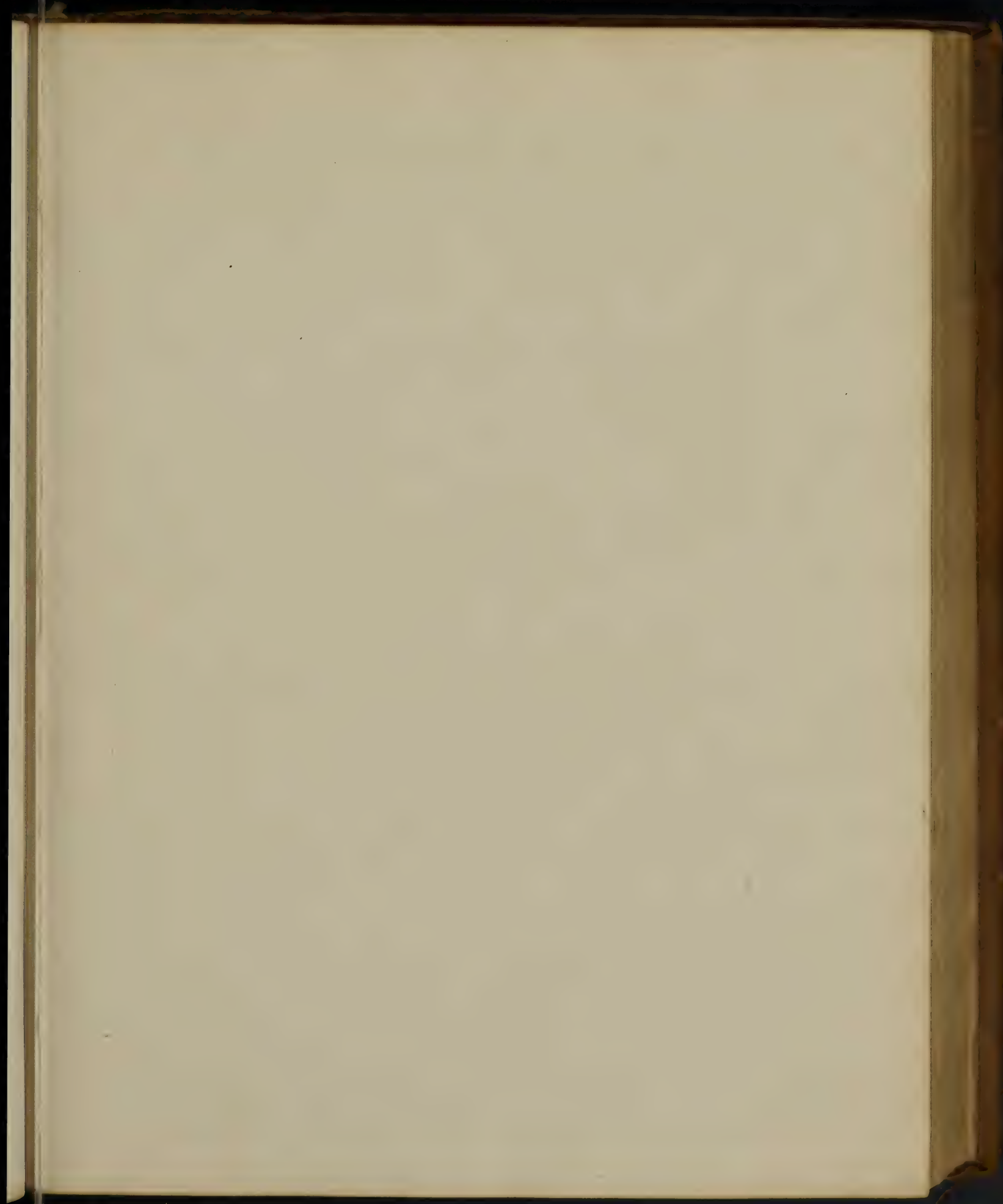
As to the specific execution of executory agreements,
contra. Rob. 661.

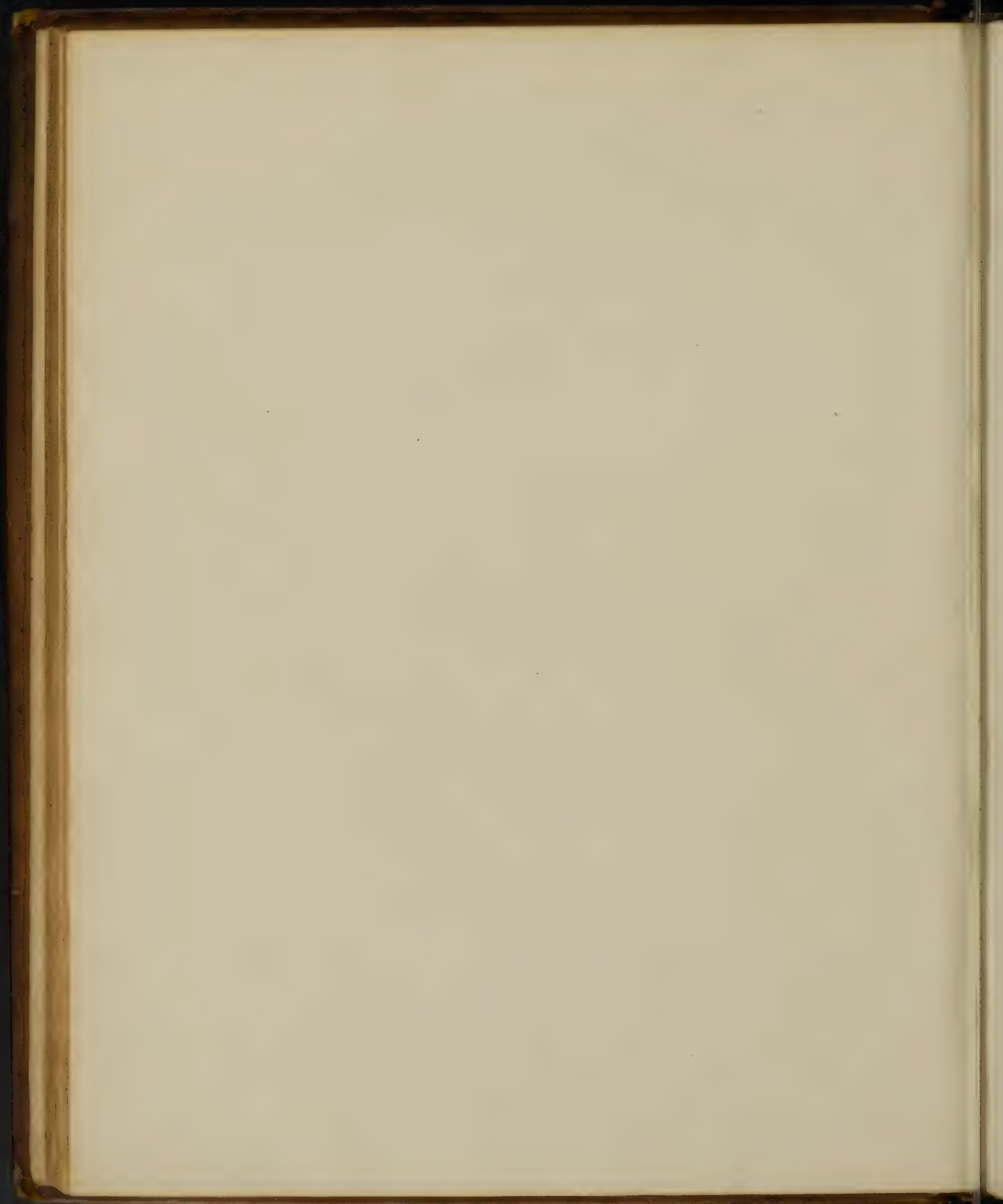
An agreement in considⁿ. of consanguinity or natu-
ral affection, will be specifically decreed in equity, only in
favor of a wife or children - not of a grandson, or an ille-
gitimate child. Rob. 664. 2 D. 582.

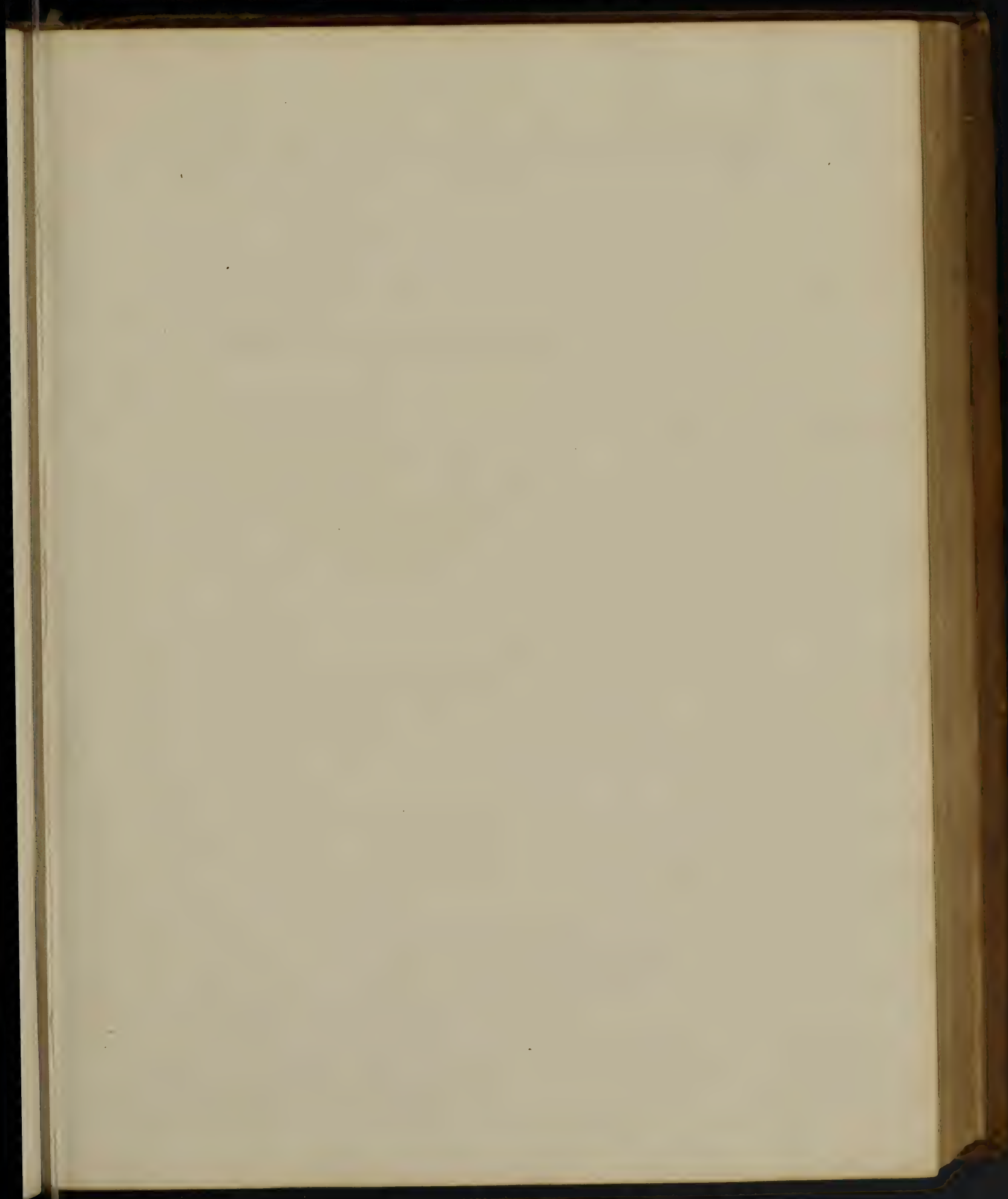


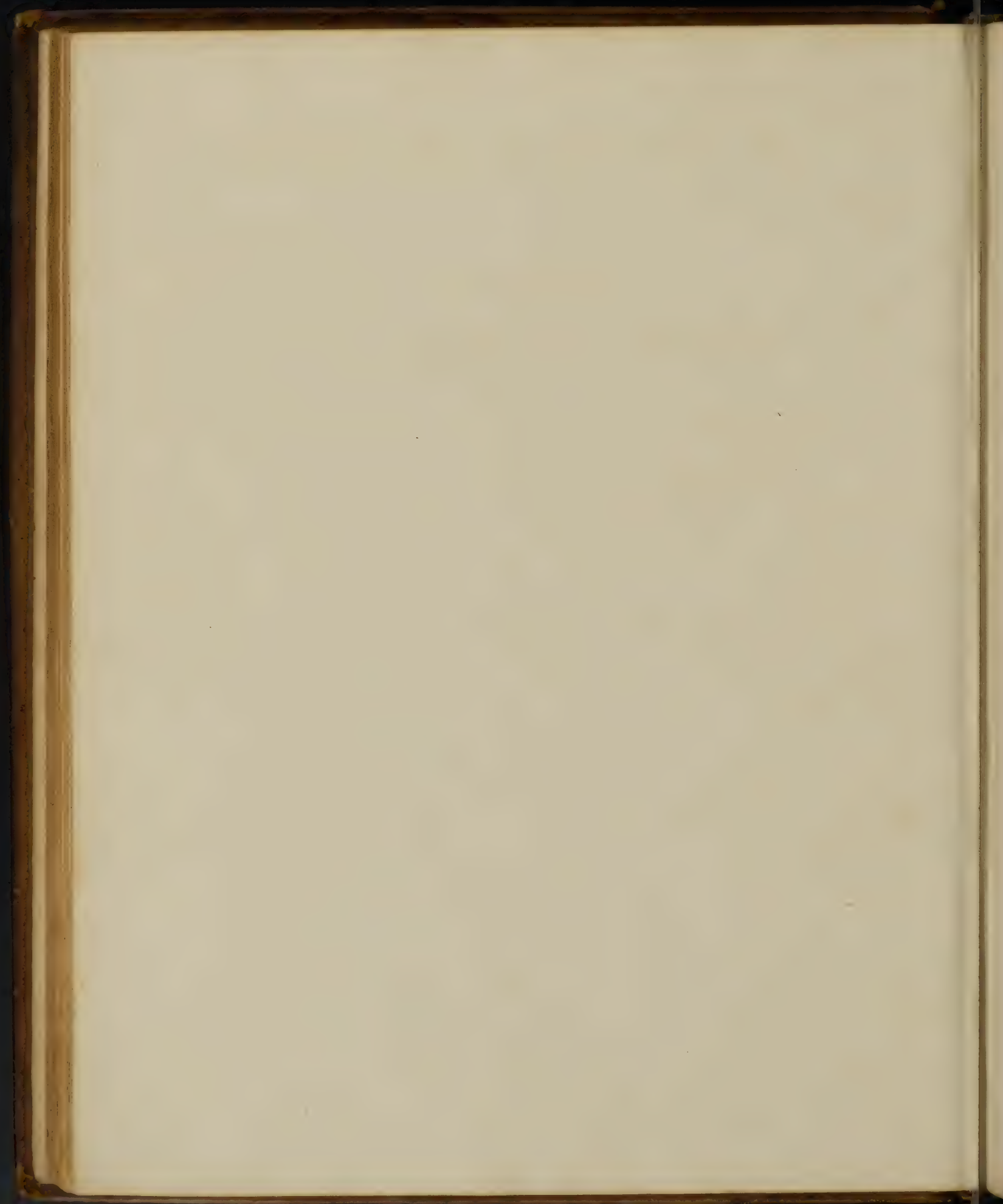












Of Injuries to Real-Estate.

Trespass.

1st Its General Nature.

"Trespass" in its extensive sense, signifies any transgression of Law. 3 Bl. 208. Esp 380.

As considered under the present title, it means an entering on another's land &c. without lawful authority, & doing some damage. 3 Bl. 209. Com. di "Trespass" A. 2.

Every unwarrantable entry on another's land &c. is a trespass - called "trespass by breaking his close" - & implies some damage - e.g. breaking down p. hedges at &c. 3 Bl. 209. 210. H. N. B. 87. 8. Esp 380. 2 Sw. 74.

In certain cases, however, an entry on another's land, without license, is allowed by Law - e.g. to execute legal process - to pay or demand money, payable there - to distress goods - by reversioners to see whether waste is committed - to get refreshment at an Inn. Esp. 380. 3 Bl. 212. 8 Co 146. 2 Sw. 74. 3. (239.)

So, if one leases land, excepting the trees - he may enter to take or sell them. Esp 381. 10 Co 46. 2 Sw. 76. H. P. T. 89. 11 Co 52. a. "Title by Deed" p

So to hunt & pursue beasts - public good. 5 H. N. 180. 29. d. 2 Bulst. 62. Cro J. 221. 3 Bl. 213. 15 H. 334. (Com. Com. "Trespass" B. 2 H. N. 558. 13.) But hunter may not dig for them.

(Of Trespas, upon things Real.)

on another's land. *Idem*. 2 Sw. 75.

Secus, of other animals. 5 Bac 180. 2 Bulstn 61. Esp. 404. Sal. 556. (- *vid.* 11 Mod 75. Sal 556. *q. if* A starts a hare on his own land, he may pursue it on to *q.* land of B. *Dun.*).

Note. If an animal *per se natura* is started on my land, & killed there, it is mine. Secus if driven into another's ground & there killed - it is then *q.* hunter's. *esp* 404. Sal 556. 2 Sw. 74.

No right to glean on another's land, at C. L. 1 W. Bl. 51. 3 Bl. 212. *Gill.* 20. 250. *cont.* *esp* 415

1/2.

But, whenever the Law gives such license, any subseq. unlawful use of *q.* authority so given, makes *q.* party a trespasser *ab initio*. For, it is said, *q.* legal presumption arising from *q.* subs. *q.* act, is, that he originally entered for the purpose of committing the unlawful act. (3 Bl. 213. 8 Co 146. Cro. J. 148. Finch L. 47. 2 Will. 61. *esp* 381. 5 Bac 161.) *Dun.* is this *q.* true reason? (*post* n. 73.) See 5 Bac 162. 3. Is it not rather, that there is a kind of tacit condition annexed to *q.* license, which is thus broken? The Law will not suffer one to be injured by its license.

E.g. a Traveller, having entered an Inn, steals any thing in it. A landlord having distrained for rent, kills or injures the distress. 3 Bl. 213. Finch L. 47. *esp* 381. 3. 8 Co. 146. Cro. J. 147. 10 T. 10. 12. 5 Bac. 161.

But in general bare non-feasance, or neglect, can not make one a trespasser by relation. It supposes no act - a mere omission. Trespass is a tortious act. There must be a misfeasance. (*esp* 383. 8 Co 146. 3 Bl. 213. 5 Bac 161. 2.

E.g. a Traveller at an Inn, fails to pay for his entertainment.

Of Trespas, (upon things real.)

tainment. this is only a breach of contract. 3 H. 2 B. 1604. Esp. 383.

So if distresses refuse to deliver back & distress, or tender of amends, before impoundment. Rem. 104. case, 5 Bae 162.

1. p. 3. Last general rule is said not to hold of a Df, who having made an arrest or mesne process omits to return the writ. 5 Bae 162. But 409. 489. 2 Ray. 532. Esp. 412. 5 Bae 90. 4 Bae 111. 171. Coups 20. (The distinctions on this point see title "False Imprisonment" -) Reason - Because without return it cannot be given in evidence. [Perhaps in the above view, this is not strictly a trespass by relation, for the arrest does not appear to have been originally lawful; Besides when a further act is necessary to complete what is begun by license of Law, the omission of it must leave the original act unjustified.

When one enters upon the land of another, under a license, in fact from the latter, a subsequent abuse of the license does not make him a trespasser by relation. 5 Bae 162. 3 Co. S. 142. 3. 8 Co 146. (See "action of trespass for injuries to personal property".) Reason of distinction 5 Bae. 162. 3.

To constitute trespass, the act causing injury, it is said, must be voluntary, for if done involuntarily & without fault, no action lies. Esp. 383. 5 Bae 180. 5 H. 65.

But this rule is not true, in cases in which the act complained of is committed by a Df. himself; Thus if Law does not regard intent - Hence an infant, a madman, a lunatic, an idiot are liable civiliter in trespass. Hob. 134. Esp. 399. Satek 13. 110. 117. Doug 699. 1 H. 66. 11. Ray 407. 2 Bae. 890. 5 Bae 179. Com. 105. inf. 61. - If any rule it can be true, that if wrong must be voluntary post 42.

Of Trespass upon things real.

One will mistake in any accident not intentional, unless in such cases, esp. 283. 3 Leon. 37. (vid. "Action of assault & battery" - 5 Com. 81. 71. 81.)

The rule then applies only to cases, in which the act is committed, not by def. himself, but by some other agent to whom he stands in a responsible relation. Then it must be voluntary on the part of def. As where def. dog, chased plff's cattle off from def's ground into p. plff's. (Esp. 283. 204. 101. 4 Com. 202. 2. Lat. 10. 13110. Injuries by servants, & innkeepers.)

This action will not lie for an injury committed on land in a foreign country; y. action being local. 4 T. R. 503. Stra. 546. 5 Com. 72. 2. Esp. 402. 2. Ric. 2. 2. 2. "Plas 8. 10"

The action for trespass committed on land is called trespass quare clausum regit. 3. R. 204. (from the words of the writ. F. R. 3. 27. 8. On a house & ground owned. 5 Com. 81. 10.)

1. p. 4. Who can maintain y. Action.

No person, except him, who has y. actual possⁿ at y. time. If injury done can maintain the action of trespass quod clausum regit. - The reversioner or remainder man cannot. 5 Ric. 106. 3. Leon. 204. 2. Lat. 263. 2. Bulst. 268. 4. Leon. 184. Esp. 383. 404. Com. di. Trespass B. 1. 2. 12. 3. post 4. 2. 2. 2. Trespass is an injury to another's possⁿ. Right of ^{possⁿ} regit. (conclude) in Com. of no other is in actual possⁿ. regit. 1. 2. 4.

And it is said y. p. possⁿ must also be lawful. - That an intruder cannot maintain y. action 5. Ric. 106. 2. Leon. 147. Plow. 240. 4. Leon. 184. 2. Ric. 76. 7.

But it seems that this rule holds only as between a wrong doer in possⁿ & him who has y. right of possⁿ. For it

Of Trespass upon things real

it has lately been holden, that any actual poss^r is suff^t to support the action as a wrong doer. (post 2.2) 1 East 246, 6. Lewis on Pl. 156. 7. 2 Burr. 1563. Stu. 1238. Willes 221. 1160 51. esp. 403. [Says in Ejectment - then poss^r must have p. right of possⁿ 2 Tr. B. 3. 249.] 5 Com Trespas B. 2 All. 7. 2 Sw. 77. Met. as p. person having the right of possⁿ.

The person, in whom the freehold is, cannot generally maintain this action for an injury done to it, while in the lawful possⁿ of another - actual possⁿ in p. possⁿ being necessary (ut supra) 5 Bac 166. 2 Roll. 554. 4 Leor 184. Com. di Tr. B. 3. "If p. party in possⁿ is a wrong doer, see distinctions post 2.12. (and vid S. 2.2. case of tenant at will.

And according to the theory of the law, he cannot recover, tho the possⁿ of the third person was unlawful. But in this case may, after regaining possⁿ, maintain p. action by fiction of law, tho not possessed in fact at p. time of p. injury. post 2.6.

An heir cannot maintain p. action, in eng^d unless he has acquired p. actual possⁿ by entry. tho he may make a lease before. see ejectment. 5 Bac 166. esp. 404 Flow. 148 2 Roll. 553. 5 Com. di Tr. B. 3.

52. pl.

A person dispossessed of land cannot before re-entry maintain this action, for an injury done to it, between p. time of his dispossession & re-entry - not in possⁿ at p. time of p. injury. 5 Bac 166. esp. 418. Tr. pa pais 232. 2 Roll 553. pl. 4. 5. 558. 5 Com di Tr. B. 3. post 7.2.

But suppose that his estate determines in p. mean time, so that he cannot re-enter, (5 Com Trespas B. 2 2 Roll. 553. In this case, he may have the action, ex necessitate. But

Of Trespass (upon things real.)

But after the disseisor has re-entered, he may maintain the action vs disseisor for such injuries - for as between them, the disseisor is, after re-entry, consid^d by relation, as having been constantly in possⁿ. - (as in the action for mesne profits after a recovery in ejectment. *Plowden* app^t 502. - (See "ejectment" 4.) 11 Co 51.^a 5 Bac 166. 7 Co 48. 2 Inst 282. 1 Roll. 12. 100. 1. 2 Roll. 554.) Said with a continuando. *Com. Tr. 13. 2. Co L. 257.^a 2 Roll. 550. 4.*

The disseisor cannot, however, even after re-entry, maintain *q* action vs a Stranger, for injuries committed between the disseisor & re-entry - for the above fiction obtains only as between disseisor & disseisor, *5 Com. 11 Co 51. a. b. Powd. M. 70. 4. & Bull 86. 7. Co L. 150. 1 Roll Tr. 1. Palm 354. 48.* See *Du. 2 Roll 554. 579. Bro E. 540. Moor 461. cont. 5 Com. 8. Tr. 13. 2.*

Q. q. Disseisor conveys to *J. T.* - or *J. T.* disseises disseisor - (11 Co. 51. a. b. 5 Bac. 188.) *J. T.* is not liable to disseisor, (*5 Com. 11* *Supra*) but disseisor is liable to him for *q* whole term. 11 Co. 51. a. b.

Reason of *q* rule said to be, that *q* purchaser under disseisor is supposed to have paid him a considⁿ & *q* trespasser upon disseisor is liable to him; and neither of them ought to be twice chargeable. 2 Inst 244. b. 11 Co. 51. b.

2 p. 2.

The last rule holds however, only *quoad actionem*, not *quoad proprietatem*. Hence *q* disseisor may after re-entry take the fruits of *q* land, which grew during *q* second as well as *q* first disseisin, whenever he may find them as grass, corn trees &c. (11 Co 51. 2. Dy. 31. Co L. 55. 6. 7 Co 132. 5 Co 85. a. Bro E. 61. 406. 1 Roll 726. 7.) *Du.* can he bring trover for the property consumed? (*Dougl. 1. Com M. 70. 4.*) vs second disseisor? Disseisor may have *q* action vs disseisor for the act of disseisin - i.e. for the first entry, before he himself re-

Trespass, (upon things real.)

re-enters. for he was then in possⁿ. 5 Com. Trespas 13. 2 Es. 404.
So of a trespass done before & dispossession. 5 Bac. 168. 2 Roll. 553. 2 Es.
418. post 70.

The person in possⁿ either of a freehold, a term for years,
or an estate at will or by sufferance (5 Com. D. Tr. 13. 12. 2 Roll. 551.
5 Bac. 167.) may maintain this action. So of any person in actu-
al possⁿ (East 244. 6. (S. 1. 4.)) as a dispossessor.

But tenant at will, or by sufferance, or a dispossessor, cannot
maintain it. only as a Stranger - not as lessee, landlord, or
person having the right of possⁿ: for the latter may enter in
either case, when he pleases, & destroy & ^{a dispossessor} tenancy. 2 M. 150. 60 L.
57. 2 M. 175. 5 Bac. 167. 2 Roll. 551. 1 Sid. 347. 13 Co. 69.

Seems, of tenant for years 5 Bac. 187. 2 H. St. 105. 120 St.
129.) he may subject lessee.

If lessee at will, or at sufferance, or at will, or at sufferance, or at will, or at sufferance,
may have trespass v. him. 2 M. 146. 500 L. 100. 5 Bac. 167. Com.
Tr. 13. 1. post p. 3.) Cro. 2. 143. 2 Es. 402.

Said, that tenant at will cannot maintain & action
v. any one, who enters by "colour of right." (5 Bac. 167. 1 Sid. 347) & 2
Roll. if the defe. was actually a wrong doer - for v. such an one,
any possⁿ is sufficient. (S. 1. 4. 44.)) 5 Com. D. Tr. 13. 2. 2 East. 244. 6.

Lessee at will, it is said, may maintain & action v.
a Stranger, if the trespass injures the Land: because & possⁿ
of lessee at will is & possⁿ of lessee. 5 Com. supra. 2 Roll. 551. 649. (S. 1. 4.)

If lessee of a term for years reserves the trees, he may
have trespass quare &c. for cutting down or injuring them dur-
ing the term: for by preservation, & Land, on which it is reserved.
vid. & thus he retains & possⁿ. 5 Bac. 167. post 4. 2.

If lessee at will commit voluntary waste, lessee may

Trespass upon Things real

may have this action wth him: for such an act determines the estate, & makes him a stranger. 5 Com. Tresp. B. 2. Co. L. 57.^a 1 Roll. 250. C. 50. (post 4. 2.)

A person entitled to the reversion or herbage of land, may have *p. action* of trespass quare &c. for a trespass done to it. 5 Bae 167. 1 Inst 4. 2 Roll. 552. 549. Moor 202. Com. D. Tresp. B. 1. Cro. E. 421. Dy. 285. (2 Leon. 213 con.) but he must be in possⁿ of the reversion &c. (3 Roll. 218. 2 Lew. 74.) at p. time of injury. post 4. 2.

But p^lff need not, in any case, be in possⁿ of the land at the time of bringing *p. action* - the right of action accrues when the injury is done. e. g. After *p. trespass*, tenant sells *p. land*. 5 Com. Tresp. B. 2. 2 Roll. 549. C. 20. 5 Bae. 167. Plow. 431.

The action lies for an injury to land unenclosed: as the word "close" does not necessarily signify an enclosure. Chit. pl. 173. Dr. & Stot. 30. 7 East 207. Sha 1004. 5 Inst 154. 1 Burr 130.

Owner of *p. soil* of a highway may have trespass quare &c. for an injury done to it. 5 Bae 167. Sha. 1004. 3 Bae 54. 1 Burr 140. Cro. E. 428. "Ejectment" 1. 2. 1 Bulst. 157. cont.

If land in possⁿ of A. is sown by B. & B. is to have half the crop - B. it is said, cannot join with A. in trespass quare &c. for an injury to *p. crop* before it is sown, because not in possⁿ. (5 Bae. 168. Cro. E. 143. 2 Roll 568. Dr. pl. 2.) but holden that they might join for *p. injury* done to *p. crop* (Cro. E. 143.) tho not in trespass quare &c. which sh^d be tried by A. alone. (H.) (See next par.)

2. p. 9. Sed. Qu. de last case - for since holden *p. if A agrees* with *p. owner of p. soil*, to plow, sow & give *p. owner* half *p. crop*, A. may have trespass quare &c. for trampling down *p. corn* & *p. owner* is not joint ly interested in *p. crop* growing - but is to have part by way of rent, after sowing &c. &c. 25 p. 402. Bull. & P. 88. 2 Lew. 77. Hous.

Trespass (upon things real.)

Husband & wife may join in this action for a trespass done on her land for injuries to her land & action survives to her. *Esp. 404. Cro. E. 96. 133.* (See little "Husb. & wife".)

Tenants in common (as well as joint tenants) sh^d. join in trespass for injuries done to their lands, & holden in common; & the action being in the person ally - for tho their estates are several, yet the damages to be recovered are not so. *Esp. 404. Litt. § 315. Co. L. 198. a. 2 Roll. 194. 2 H. Bl. 387. see "Joint in common".* So of coparceners. *Esp. 404. Co. L. 198. a.*

If a commission of bankruptcy has been issued to one, who was not an object of f. bankrupt laws, & f. assignee take possⁿ of his lands, house &c. this action ^{lies} as then, & commission being void. *Esp. 398. 3 Wils. 382. Waind. 480. -*

3. p. l.

For what injuries f. action lies, & contra.

Every person is answerable, not only for his own trespasses, but for those of his cattle; & if they, by his negligent keeping stray upon another's land, & much more if he permits it, or drives them over, he is liable for f. injury they do, in an action of *Trespass*. *3 B. & C. 211. 5 B. & C. 179. post. 4. 2.*

Secus, if they enter ^{tho} f. neglect or fault of f. owner of f. land, as for want of a suff^t. fence, which it was his duty to maintain. *5 B. & C. 181. 2 Roll. 585. S. p. l. 3. n. & pa. see "plevin", & post. 4. 4.*

But in this case f. party injured has his election of two remedies. He may either distress the cattle, as damage for want, or hold them impounded till satisfaction made - or bring this action. *3 B. & C. 211. 5 B. & C. 179. Esp. 386. 7.*

The action lies as f. against owner of cattle, & accord^g to some opinions as him only. Accord^g to others, it lies as either f. against owner. *5 B. & C. 188. q. 2 Roll. 546. Esp. 387. post. 4. 4.* (See.

Of trespass, (upon things real.)

But he cannot, regularly, pursue both remedies. Thus if he distrains, he cannot maintain trespass, & converse - so? Only one satisfaction. 5 Bac. 179. Tal. 248. 12 Mod. 663. Esp. 387. For the distinctions see "Suppl. viz."

It has been holden, that if A. by a tortious act, puts B's cattle on the land of C. - he may distrain them & damage fees and - 10 Mod. 665. 10 Mod. 649. 10 ac. "distress". 1 Sid. 88. 707. - Qu. For C. cannot maintain trespass v. B. (Com. tres. C. 1. 2 Mod. 553. C. 25. (see two next rules) - are not y. cattle mere instruments of mischief in A's hands?

If the tree of A. is blown down upon y. land of B. & A. goes to take it away, the action does not lie (5 Bac. 178.) Scus. of the shavings of a tree which fall on another's land, if y. falling might by proper caution, have been prevented. 11. 2 Mod. 895. Doug. 719. arg? The falling of the tree, is not the act of A. the cutting, & consequent falling, are. - The former inevitable, the latter not so.

If A's timber floats on to B's land, & does damage, A. is said, to be liable. Qu. unless negligent. Qu. liable in trespass or case? (2 H. Bl. 2078.) In case, I presume.

If A's beast, being stolen, is put into the close of B. - A. is justified in going after it. no action v. him. 5 Bac. 178. 2 Mod. 655.

3 p. 2. If the fruit of A's tree falls upon y. land of B. & A. goes after it, he is not liable - y. falling & not to be prevented. 5 Bac. 178. Talch. 120. Doug. 719. arg?

But if y. roots of a tree, stand on A's land extend into y. land of B. they are tenants in common of y. tree & fruit. Scus. if y. roots do not extend into B's land, the y. boughs shadow B's land - in this case the whole is A's. - 1 Mod. 85. 2 Mod. 737.

Trespass, (upon things real.)

If A. being bound to repair a bridge, cannot do it, without going on B's land, he is justified in going on to it. Necessity. (5 Bac. 179.)

If A. has sold trees, growing on his own land, B. the latter is justified in going upon A's land to cut, & take them away. This right is implied in the sale. 5 Bac. 180; 2 Roll 567. ^{Still by B's}

Once holden, that if one goes upon the land adjoining a navigable river to tow a boat, & entry is justifiable for public good. (5 Bac. 180; 1 S. Ray. 725. 6 Mod 180.) But this is not law (3 T. R. 253. 1 Burr. 292. 36.) not allowable, except by special custom.

3 p.d.

But it seems to be agreed, & if a public highway is impassable, travellers may go on A's adjoining ground required by public convenience. S. Ray. 725. Dong 716. (712) 2 Show 28. 2 W. Jon. 296. 3 T. R. 263. 2 Bl. 36. Com. D. Chinn. D. C. Dec. 234. ^{2 Bl. 76. 3 p. 2. 400. 1.} Qu. if the adjoining land is enclosed? S. Ray. 725.

The above rule does not hold, however, as to a private way - the public not interested in it - it is granted duty to keep it in repair. ^{Taylor v. Whitham} Dong 716. 2 Sw. 74. 2 Bl. 36. (Com. sup. con.)

A person cannot maintain this action for an injury to grass, growing on land, in which he has a bare right of common: for tho he has a right to take it by feeding his cattle, he has not a prop^r. (5 Bac. 167. 2 Roll. 552. D. H. D.) nor is the property his - the right is incorporeal. (2 Bl. 33.) If disturbed in the enjoyment of his right of common, he may have trespass on the case. (See "Action of Tresp. on Case")

Entering another's house, without permission or lawful authority, is, in strictness, a trespass, tho the door be open. 5 Bac. 182. How. 71. 2 Roll. 555. 2 p. 1. 2 Roll. 208.

But if the owner has voluntarily taken another's into

Of Trespass, (upon things real.)

into his house, & latter may go in after them, & door being open, without permission - the owner being the first wrong-doer, (5 Bac. 182. Cro. E. 246. 2 Roll. M. 56. 2 Lutw. 1385.) the Law gives the license.

So, if he enters to suppress a riot, affray or other disturbance of p. peace. 5 Bac. 182.

3p.4. So, the Law allows one to enter the house of another, the door being open, to pay or demand money, then payable to (at ante. 1.1) 30 Bl. 212. Esp. 380.

So, to execute process of law. 30 Bl. 212.

And a house may be broken open, for p. purpose of executing criminal process - provided p. officer first demands admittance, & declares p. cause of p. demand - but otherwise he will be a trespasser. 5 Bac. 183. 5 Co. 91. 4 Leon 41. 4 Bac. 454.

But a Sheriff cannot justify the breaking of another's door or window of another dwelling-house, for p. purpose of arresting his body or taking his property or civil process - This castle. 4 Bac. 454. 5 Co. 91. Coupl. 1. Cro. E. 409. Hob. 62. Esp. 604. Kirb. 383. 2 Bac. 367. 5 Bac. 183.

But this privilege of castle is constrained very strictly. It extends to no other than the outer door & windows - not to inner doors, chests, trunks &c. These, after demand & refusal, may be broken. Coupl. 67. 4 Bac. 454. 6. Kirb. 383. Hob. 62. 253. Esp. 504.

The privilege does not hold as a writ of habeas fac. possessionem. 5 Co. 91. 2 Bac. 179. 5 Bl. 183. "Ejectment", 39.

For further distinctions vid. "Sheriffs" &c. p.

4p.6. An officer is justified in breaking a house to execute a legal search warrant. 1 Hale. Pl. 58. Esp. 399. 2 Wils. 275.

But

Of Trespass (upon things real.)

But all general search warrants are illegal, & furnish no justification - Strictly void. 24. Warrant to search for goods in all suspected places - Est. 399. Kirb. 213. 2 Wils. 275. 291. See Hob. 253. 1 Vent. 31. Carth. 409. Sal. 418.

And as the law is now settled, no search warrant is legal, unless it is issued under the following restrictions - 1. The party applying for it, must make oath to 7th facts on which the application is ~~grounded~~ ^{grounded}, & to his belief that 7th goods are concealed in such a place. - 2. It must be executed in 7th day time, & by a known officer. - 3. It must be executed in the presence of 7th informer. Est. 399. 1 Hal. 150.

The warrant being legal, the party who obtained it, is justified or not, by the event, & the magistrate & officers are justified, whatever 7th event is - (Est. 399. 2 Wils. 291. 2.) The party assumes 7th risks - vid. 3 Est. 135.

For Stat trespasses in Cor. see, 2 Lev. 80. 1. Stat. C. 422. 7.

4. p. 2.

Against whom 7th action lies, &c. contra.

It lies not ~~as~~ ^{for} years, for cutting timber, nor for cutting & carrying away (Est. 401. All. 83. 4 Co. 62. 2 S. 571.) less not in posⁿ of the don (ante. 14.) The remedy is by writ of waste.

But, if after being cut, they are suffered to remain a time, & then carried away, trespass by less will lie - not in don for the cutting, but for carrying away. This however is not trespass qua. cl. p. (Est. 400. 4 Co. 62.) The property is then a chattel personal, of which the less has 7th posⁿ in law. (See "Trove.") Seems, if the cutting & carrying away are one continued act.

If one leases land, excepting the trees, less is liable

Trespass, (upon things real)

in trespass for cutting them - The lease does not entitle him to the possession of them. (As to them he is a stranger. Esp. 400.) Co L. 57^a (ante 2.2) infra

So, the action lies for lessee at will ~~not~~ before, for cutting timber trees upon the land. the very act determines the estate, & his possⁿ as lessee. Esp 400. 10 Mod 860. Co L. 57^a Litt. S. 71. (ante 2.2.) So, if he does any other positive injury to the subject. 5 Bae. 188. 5 Co 13^b Cro. E. 784. Dy. 122.^b

But it lies not, in such case, ~~not~~ tenant by sufferance, unless lessee has entered - for the act does not determine the estate - of course, before entry, he is not a disseisor, nor stranger, but a tenant in possession. Esp. 400. 2 H. 150.

Tho the trees are excepted in a lease for years (ut. supra at p. top) yet if injured or destroyed by lessee's cattle, the action does not lie: for lessee has p. use of p. soil, & a right to put his cattle upon it. Esp. 400. 2 H. 739 (ante 3.1.)

4. p. 3. This action will lie ~~not~~ a transitio - & malice not necessary. intention not required. 5 Bae. 184. 7 Co. 134. Lutw. 13. 110. (ante 1.3.)

Every person concerned in the trespass, is liable to the action. ex. aiders, abettors, &c. No accessories. all principals. 5 Bae. 188. 1 Lev. 124. 4 H. 38. 17 Hal. 613.

E. g. If A. commands or requests B. to commit a trespass, & he does it, A as well as B. is liable. 5 Bae. 185. Sal. 409.

If A "agrees" to a trespass (i.e. take benefit of it) committed for his benefit, by B. he is liable - tho he does not command or request B. to commit it. 5 Bae. 185.

(How far Master is liable for servants' trespasses, see "Master & Servant.")

If several join in a trespass, p. party injured may have p. actions ~~not~~ one or more or all of them. 5 Bae. 185. 8 Co. 159. 5 T. R. 649. See

if trespass upon things real.

Said by Bacon that if the party injured has brought his action vs one of them, he cannot bring a second action vs another for the same trespass. (5 Bac. 185.7) & that pendency of p. former is a good plea in abatement.

1204. Law. He may sue each in a separate action. 5 Bac. 192. Sta 420. post 52.

But he can have only one satisfaction - only one recovery of damages. 4 Bac. 115. Cro. 73. Yelv. 67. Hob. 66. Esp. 415.

4.10.4 Therefore a former recovery vs one of them is a bar to an action afterwards brot vs another of them for the same trespass. 5 Bac. 185. 4 Bac. 115. Cro. 73. Yelv. 67. Esp. 415. Cro. 38. post 64.*

If the person who has granted the vestures & herbage of his land to another, disturbs the grantee in the enjoyment of it, trespass lies vs him the grantor. 5 Bac. 187. Dy 285. ante 2.

The action lies vs lessee for life or years for a trespass upon lessee's profits. Case 139. 5 Bac. 187. ante 3.1.

If A's cattle being registered by B. break into C's close, B. is liable. & according to some opinions, B. only. 5 Bac. 188. 2 Roll. 46. Esp. 387. Jenk. 161. ante 3.1.

If A's cattle pass thro the defect of B's fence into the close of C. - & thence thro the defect of C's fence into the close of D. C. may have trespass vs A. for C. was bound to fence vs such cattle only, as B. sh^d. put into his close. But A. may then have case vs B. (Qu. vi. ant. quot. T. T.) 5 Bac. 189. Jenk. 161. 1 Freeman. 379.

* Said also by Bacon, that an acquittal of the deft. in the first is a good bar to the second. (5 Bac. 185.7. city Cro. 668. which does not support the ~~antient~~ proposition - not law as it stands - "Quod" "vi"

(If trespass upon things real.)

5p.1

Of the Pleadings.

Where the trespass consists in the abuse of an authority given by Law, it is sufficient to state the trespass generally in the declaration, & if Deft justifies in his plea, the particular injury, or abuse of authority comes out in the replication: Esp. 405. Sal. 221.

E.g. Trespass for breaking house & taking goods, breaking furniture, &c. - justification of p. entry - replication stating the subsequent wrongs particularly, by new assignment: Esp. 405. Sal. 221. Bull. 81. 3 T.R. 292. 10 T.R. 677. "Pleading". 5 Bac. 213.

Plff. may include several trespasses in one declaration. E.g. cutting his trees - breaking his house - destroying his goods. &c. Esp. 407. Sal. 119. 4 T.R. 196. 5 T.R. 51. 5 Bac. 192. but in difficult cases.

And to show how aggravated the trespass was, & thus to aggravate the damages, plff. may join in p. declaration wrongs, for which he c^d. not maintain an action. E.g. breaking & entering house, & beating servants. Esp. 407. 10 T.R. 225. 6 Co. 7. 564. Sal. 119. 542. 4 Bac. 12. 2 Bur. 1114. 5 T.R. 197. 10 T.R. 1060. 1302. (1005 7. 5.) Proc. Dec. 21.

Law. can p. beating of servant (&c. with a per quod, be joined in last case? 4 T.R. 12. Esp. 407. Sal. 43. 207. Bull. 113. "Pleading".

It may be joined (2 T.R. 166. 2 T.R. 1032.) when it can be treated as part of the same transaction - as in case of servant injured per quod &c. It is only a continuance of the same trespass. But one breaks my house at one time, & beats my servant at another. They cannot be joined - & if no per quod is laid, there can be no recovery for loss of service & no evidence of it. 5 T.R. 542. 10 T.R. 386. 3 T.R. 133. 4 Co. 113. 10 T.R. 346. n. 2. 2 East. 104.

The day laid in the declaration is not material -

trespass

Of Trespas upon things real.

trespass may be proved on any day. Esp. 407. Co. L. 283. Cro. 2. 32.
post 6. 1. 73.

5. p. 2.

So the action may be had as several for a joint
trespass, or for each separately in a separate action. 5 Bac.
192. 185. 6. Str. 420. 8 Co. 159. ante 4. 3. Esp 317.

But it is said, that if it appear upon the face of the
declaration, that a certain person, not sued, was party to
the trespass with the Defe, the declaration is ill. 5 Bac. 192. 3.
Leon. 41. 760. 6. 184. 199.

Qu. as to the principle not law, sumb. 1. Lawd. 291.
Sal. 32. 650. 766.

It is agreed however, by all, that if a declaration
charges the wrong to have been committed by Defe. together
with another, to persons unknown, it is good. 5 Bac. 192. Leon 41
But it makes no difference, in principle, whether those, not
joined, are alleged to be unknown or not.

The practice is, to take no notice, in a declaration
of any party to the trespass, who is not joined as Defe. And
there is no need of mentioning any other than the Defe. The
act, of all, is the act of each.

The trespass must be said to have been done, with force
& arms (viol armis & to the peace). These at C. L. are matters
of substance. 5 Bac. 191. 3. 4 Bac. 11. Sal. 636. 640. 7. N. 3. 196. 2 Bac.
506. Gaith 390. 66. 1 Show. 28.

Reason, of the rule: On conviction of a wrong commit-
ted with force, & Defe. was at C. L. fined - judge a capessio-
neus. if the wrong was not forcible, as in actions on contract
& on y. case - in these if injury judge was a misericordia. Defe
amended. 2 Bac. 506. 7. 5 H. 191. 3.

Of Trespass, (upon things real.)

But by St. 16. & 17. Car. 2. p. omission of these words may be amended after verdict. (5 Bac. 142.) but if declaration is ill on general demurrer. Fal. 636. Esp. 408. -

5. 113. Now, indeed, by St. 5 W. & M. the capiatum pro fine is taken away - & so difference between p. judgments in the two classes of cases, ent. & destroyed. Plff. or signing judge pays 0, 3 for the fine to x. crown, & recovers it back, as costs, from Deft. 5 Bac. 191. 2 Bac. 507.

See holden by L. Holt, that since p. Stat. of words, in et armis, are not necessary. L. Ray. 985. 5 Bac. 191.

But this is not Law, similes. The words are still necessary in Eng. to lit in the provisions of p. Stat. 5 W. & M. 5 Bac. 191. 2.

In Cor. these words are not, on principle, matter of substance. - No fine - no capiatum - no difference in p. judge - no such Stat. as that of 5 W. & M.

Once decided by our Sup. Ct. that a declaration omitting both sets of words, was good, on special demurrer. (Rogworth v. Phelps, 1796.) Sid. 22. - writ of error was prayed out, but not prosecuted.

It is a general rule, that the injury for which trespass is brought, must be specifically & specially alleged in the declaration. (5 Bac. 194. Sid. 225.) i.e. no evidence can be given of any particular wrong, for which damages are claimed, unless it is specifically charged. Ex. Trespass for breaking plff's house, & alia in omnia taking & carrying away his goods - not provable.

Mute relaxed, where the action arises ex turpi causa. (Sid. 225.) to avoid inducency.

5p4.

The declaration must state the value of the thing, for

Of Trespass upon things real.

for the taking or injuring of which the action is tro. &c. of,
grafs trodden down &c. 5 Bac. 196. 1 Sid. 39. 2 Lev. 230. & 430. esp. 407
3 L. Ray. 113. (Plind. aff. 488. 497.) but it is not necessary in all
cases to state any quantity (See examples.) 5 Bac. 196. Cro. 435.
cattle's eating peas. destroying hedges &c.

But the omission of the value, is aided by verdict.
4 Bac. 2455. esp. 407. Cro. 130.

In trespass of a permanent nature where the in-
jury is such as to be capable of renewal or continuance
& where it is renewed or continued on different days &c. (p. 114)
may recover for the whole, in one action, laid with a con-
tinuando. 3 BH. 212. 2 Roll. 545. 2 L. Ray. 240. esp. 407. 417. Tal. 638. 5 Bac.
197.) & concerning or treading down grafs &c. post 72. &c.
of trespasses, which may be laid with a continuando: con-
cerning or treading down grafs &c. (3 BH. 212. esp. 407. 8.) these
are capable of renewal or continuance.

Or, he may bring a separate action, for each day's
separate injury. 5 Bac. 197. Dy. 320.

Laying the action with a continuando, is al-
luding the injury to have been committed by continuance,
from one given day to another. 3 BH. 212. 5 Bac. 197. 8. L. Ray.
240. Th. Ray. 346. Ejedment 4. 13. 2 Sill. Ent. 444. 1 Sand. 23. fairs.

But where the several acts of trespass terminate in
themselves, & being once done, cannot be done again, or continued,
they cannot be laid with a continuando, the committed a several
days. &c. Cutting down trees. killing several hares &c. (L. Ray. 239. 975.
esp. 407. 3 BH. 212. 1 Sid. 319. 2 Roll. 549. Tal. 638. 9. 5 Bac. 198.

But in these cases the several trespasses may be
laid to have been done at divers days & times before.

Of Trespas, (upon things real.)

such a such a day" not continually. Esp. 407. 304. 212. Sal. 638. 639.

L. Ray. 823.

O.p.1.

But if several trespasses are charged, & only one day laid in the declaration, no verdict can be given except of the acts if done on one day. L. Ray. 240. 976. 7. ante 51. Esp. 408. Sal. 639.

There are two ways of declaring with a continuando. - 1. The trespass may be laid, with a continuando for the whole time - from such a day to such a day. & this mode is proper when the trespass was continued without interruption for a longer term than one day. 5 Bac. 197. Co. Ent. 661. Com. Tresp. B. 2. ante 21. Ejctment 4. 1. 2. 9. 4's cattle continued on B's land several days.

2. Where the several acts are not committed in continuity, but by intervals, & on different days, they sh^d. be laid, by continuando, on divers days & at divers times, from such a day &c. (5 Bac. 198. L. Ray. 240. Co. Ent. 648. 658.) but the particular intervening days need not be laid. (5 Bac. 199. Inst. 124.) Ex. Destroying herbage on diff^t days, but not continually. Qu. Is this distinction attended to in practice?

Where there has been an ouster of poss^r & re-entry, & ouster, & all acts done under it may be laid with a continuando. The diff^t trespassing poss^r having been continual. And if after re-entry, pl^{ff} has been again ousted, & again re-enters he may lay the whole with a continuando. Esp. 408. Cro. E. 182. L. Ray. 975. Sal. 638. ante 2. 12. 73. Ejctment 4. 2. 1. - pl^{ff} may set forth the ouster & the whole case specifically. L. Ray. 977. Pleas. 1st. 502.

Of trespass, which cannot be laid with a continuando are several, & declaratⁿ is ill - even after verdict. Esp. 408. Sal. 639. 5 Bac. 195. 1. L. 210.

Of trespass, upon things real.

6 p. 2.

But if some of the trespasses, laid with a continuance, may be so laid, & others cannot, & declaration is good after verdict. (tho the damages are entire) for it shall be intended that the damages were assessed only for the former. 5 Bue. 200. 3 Lev. 44. 1 S. & 375. 2 Show 196. Gal 539. & Ray. 239. 2 Esp 408. (See further distinction & Ray. 239. 240. per Powell, J. It is good also, I conclude, on demurrer, as some of the trespasses are well laid, & so a sufficient cause of action well alleg'd.) Ques. is this correct in principle?

The general issue in this action is not guilty. Esp. 411.

And if a person indicted for a trespass has confessed, & the entry of his confession has been made upon & record, he is not forever after estopped to plead not guilty to an action brought for the same trespass. Esp. 411. 2 Hawk 330.

At C. L. a special justification must be pleaded, & must be given in evidence under & general issue - for & general issue denies & facts a justification admits & avoids them. Evidence inconsistent with the plea. Esp. 40. God. 282. 1 Str. 61. 1 L. Ray 702. Gal. 287. - Thus under our Stat.

But deft. may give in evidence under general issue, a lease for years - for this ~~plea~~ disproves the material allegation in the declaration viz. that deft. broke plffs close. Esp. 411. 2 Roll 170.

So, on general issue deft. may prove that he is tenant in common with the plff. - for the action does not lie between tenants in common. But that plff is tenant in common with a stranger to & suit, sh^d. be pleaded in abatement. Esp. 411. Gal. 4. To per pais 207

6 p. 3.

A plff may justify under general issue, without pleading the facts (i.e. when the action is by a party to & property)

Of Trespass upon Things real.

-24. p. deft in p. 23) He must stay the writ. But if p. action is tried as the p. in a former action, or a Stranger, he must show the p. as well as ex'con. for the p. may be reversed. & if he takes ex'con afterwards, it is at his peril. Esp. 411. 2. Sal. 408. 2 Lev. 20. - see Esp. 419. S. Ray. 733.) The p. in the former action, is p. to p. p. exp. he must show it. And a Stranger, being a volunteer, acts at his peril. - (24. an atty.)

Any person acting in aid of an officer, at his request, may justify, as the officer may do. But if request is transmissible. Esp. 412. Sal. 107. 402.

Accord & satisfaction is a good plea in trespass. but an accord alone is not. Esp. 415. 10. 128. Trin. 391. 20. 80. Stra. 573. Doct. pl. 19. (See "Plea to Assumpsit".)

So is an award of arbitrators. Esp. 415. Bro. 2. 66. "Plea to Assumpsit".

Release is also a good plea in bar. But if a release before action, but is pleaded, there must be a traverse, that he is guilty afterwards & before the suing out of writ. Esp. 415. Sal. 222. Hob. 104. S. Ray. 229. (See "Plea to Shaving".)

And if the action is tried for a joint trespass, a release to one is a discharge to all. Each is answerable for the acts of p. others. Hence a release to one is a release of the trespass. Esp. 415. Hob. 66. 4 Bac. 282. God. 272. 5. Co. 97. Bro. 444. 4 Mod. 279.

2 p. 6. But if the action is tried as two, who sever in pleading, & one is found guilty, & damages assessed. p. may in a mol. pros. as to the other. Esp. 415. 6. Hob. 70. Bro. 211. no discharge - the writ as the former is at an end. recovery had. 4 Bac. 282. non

Of Trespass upon things real.

Now settled that a not. pros. may be entered, as above, in the earlier stages of the action - & that the other defts are not discharged - not in nature of a retaxit. Staud 207^a n. 6. 10. C. 239. 242. Caith. 19. 1. Wils 90

So, if plff has sued one only of several joint trespassers, & recovered judgment against him - this is pleadable in bar to an action afterwards brought vs the others - can be but one recovery. - Esp. 416. Cro E. 30. 4 Bac. 115. Cro J. 73. Yelv. 678. Salub 216. Wils 4. 4

By Stat. 21. fac. 1. deft. may plead in bar a disclaimer, & that the trespass was by negligence & involuntary. & London of Suff. a nund before action brought - but he must plead what sum he tendered. Stat. extends only to cases of involuntary trespass & disclaimer. Esp 416. Fl. 549. 2 Roll. 570. Sal. 586.

No such Stat. in Con.

Stat. of Limitations good plea in bar - 6 years in eng. by 21. fac. 1. - 3 in Con. - Specially pleaded in eng. - may be given in evidence here. Esp. 416. Stat. C. 272.

The plea of title in trespass amounts to a general issue, & is therefore not allowed. Still it may be specially pleaded, by giving colour. 3 Bac. 309. 4 Bac. 102. 5 Fl. 208. 9. 10 Co. 40. 1. Lanes 51. 126. 150. - See "Pleading" p.

7 p. 1.

In Con. a special plea of title is warranted by Stat. (Stat. C. 428. or 582.) tho it may be given in evidence under a general issue.

The Stat. provides that when in an action of trespass before a single minister of Law, as a justice of the peace or judge, pleads title, a record shall be made of it. The matter of fact shall be taken pro confesso, & the deft. shall become bound with one or more sureties in a recognizance that he shall pursue his plea, & bring a suit for the value of his title.

(Ejectments, (upon real Estate.)

at the next Ct. of Gen. Ct. in the county in which the trespass is laid & pay all costs & damages that may be recovered against him.

If deft. refuses to become bound, his plea shall "abate", & the Ct. shall try the case, as in the genl. issue, & on "issue". Stat. 425. "upon due proof of the trespass committed."

If he becomes bound (ut supra) the record is to be certified to the next L. Ct. & if he fails to "bring forward" such suit "is default" shall be recorded, & scilicet issue on the recognizance. Stat. 662.

The practice on this Stat. is not however, for deft. to bring a suit in L. Ct. but to enter in that Ct. a copy of the justus record, & upon that to make his defence. 2 Lev. 80.

And if, on trial, the deft. does not prove his title, p^lff shall recover treble damages & costs. St. C. 426. 2 Lev. 80.

7152. In L. Ct. deft. must abide by his plea of title, cannot change it. 2 Lev. 80.

A proof on this plea of title, is no bar to an action of ejectment by a unsuccessful party - does not conclude title. 2 Lev. 79. "Hib. 375. judgment of a higher nature (6607). Dec. It seems conclusive as to the same fact or title (which was put in issue) in any future action - as an estoppel. 3 East. 340. St. 21. 175.

Title may be given in evidence & tried, under a genl. issue, before single minister. The record does not import to divide the title.

As to a new assignment see "Pleading". 5 Mac. 210.

A verdict or judgment given in evidence under the general issue, is no estoppel. (Lev. 40. 21. 3 East. 345. 365.) tho' good evidence. (Title by Decd. p.)

If trespass, (upon things real.)

Of the Evidence.

The evidence must follow the issue. i.e. no matter going to the merits, but not embraced by the issue, can be given in evidence. Esp. 417. 2 Bl. R. 1165. 3 Bur. 1385.

But under the general allegation of *alia enormia* plff may give evidence of any matter of aggravation which will not itself support an action (i.e. on a genl issue) - But no evidence can be given of a fact, which in itself supports an action for the plff. unless it is alleged Esp. 417. Sid 225 (ante S. 1.) 2 Bur. 1114. Que. Dou 21.

If plff sets out the particulars of his claim, he must prove them as laid. But if an abatement is laid "to the case," proof that it is *N.E.* is sufficient. Esp. 417. 2 Roll. 677. Yelv. 114. "En judgment" 30.

When the action is laid with a continuando plff must confine his evidence to the time laid (Because it enters into description?) - But he may waive & continue and so prove a trespass ^{or} any day (Esp. 417. 8. Bull. 86. (ante ^{S. 1. 4.} ~~ante~~ ~~ante~~)) or he may give evidence of only part of the time, laid with a continuando. Bull. 86.

When it is thus laid, plff must prove a re-entry. - Since he can recover for the first entry only. Esp. 418. Tr. pa. 232, ante ^{S. 2. 11.} S. 1. This rule holds only where & plff has been ousted.

If plff makes a new assignment & a genl issue is pleaded to it, he cannot prove & diff. guilty of the trespass at the place mentioned in the plea in bar. That is waived. (Esp. 418. Cro E. 492. Lawes 241.) i.e. when the trespasses newly assigned, are alleged to be at a diff. place from that justici- fied. (Lawes 241. 164.) They are generally so alleged not always

Of Trespass, (upon things real.)

Somb. Laws 164. If they were how c? they are made a trespass by relation, by a new assignment, where the acts justified & those newly assigned are one transaction. Ex. Entering house, breaking furniture &c. (3 C. 20. 297. 8 Co 146. 12

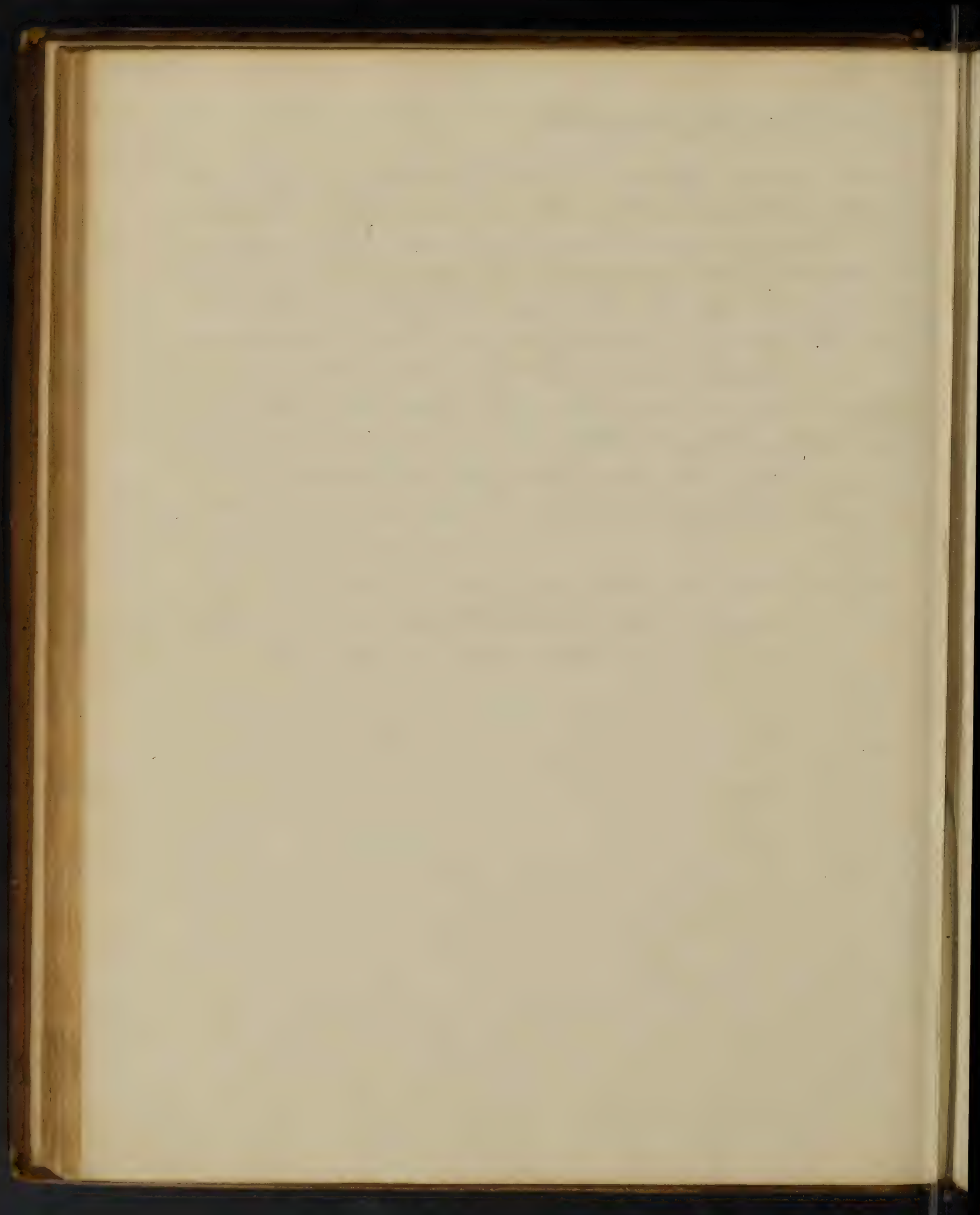
7. p. 4.

If on a plea of justification the deft proves so much as amounts in Law to a justification it is suff. tho he does not prove the whole, as pleaded. Esp. 419. Yelv. 148.

When the action is by a Stranger to an Executor a Sheriff who acting under it, has committed a trespass, &c. Sheriff must show in evidence a copy of the judgment. - Tens. if by a party to the Exec. (as p. deft. in it.) - Esp. 419, 411. L. Ray. 733. 5 Bona. 2031. 2 C. 20. 701. 2. p. 3.

As to several damages, where there are several defts. see "Action of Assault & Battery." Esp. 420.

For Costs - see Stat. c. 677.



Of Ejectment & Remedies for it, viz. Ejectment & Disseisin.

1. p. 1.

(For the real actions at C. L. See 3 Bl. 141. &c.)

Eject is an injury by which a tenant in possession of land &c. is wrongfully removed, or turned out, from it. 3 Bl. 167. 149.

The word "disseisin" denotes an ouster of the freehold; the word "dispossession" an ouster of an estate less than freehold. 3 Bl. 169. 149. - For the different species of ouster, see, 3 Bl. 167. full.

Ejectment is an action, by which a lessee for years, when ousted of his term, recovers it from the wrongdoer, together with damages. 3 Bl. 149. Esp. 427. 2 Bac. 160. 5 C. 104. 9 B. 77.

Disseisin (in law) is an action, by which a person dispossessed or ousted of his freehold, recovers it from the disseisor, together with damages.

Our action of disseisin is strictly, a mixed action, & so is the action of ejectment called 2 Bac. 160. Com. Pl. 250. Com. 118. 3 Bl. 149.) tho it does not exactly correspond with the definition. 3 Bl. 118.

Anciently, the plaintiff in ejectment recovered damages only - no restitution - tho if ousted by the lessee, he might recover the possession by an action on the covenant for quiet enjoyment. But if the ouster was committed by a stranger, the lessee had no other remedy than by ejectment in which he recovered damages only (3 Bl. 157. 8. 200. 3 B. 118. 100.) tho the lessee might, in a real action recover possession of the freehold.

Afterwards however when the Stat. of 11 Geo. 3. began to compel the ejector to make specific restitution the Stat. of 11 Geo. 3.

Of Ejectment & Disseisin.

Law also adopted the same mode of doing justice, by rendering judgment for the recovery of the term, & disgorgement of profits. tho' the declaration demands damages only. 20 Bl. 200. 1. 2. & app. n. 11. Where p. land is demanded. Holden v. Cuffay. 1 Root 438.

This practice appears to have been adopted as early as the reign of Edw. 4. (3 Bl. 201) Since that time the remedy has been specific.

And for a long time past, this action tho' founded nominally upon the ouster of a term only, has been, in Eng. the common & almost the only method in practice, of trying the possessory title to real estate. It has been used for this purpose ever since the times of Hen. 7. 3 Bl. 200. 1. 5. 2 Bac. 160. 2 Bac. 667. 8.

This is now done by a string of legal fictions, which are delineated in 3 Bl. 200. 5. 2 Bac. 160. 6. No such fictions here. The plaintiff recovers directly by action of disseisin.

Since the action has been thus used to try p. lease title, the damages recovered in it, are usually nominal only. (2 Bl. 200. 2 Bac. 181.) - In real actions (except in a fine) no damages are recovered. 2 Bac. 181. 160. 667. 682. 257. 3 Bl. 187.

For what things Ejectment lies.

The action will not regularly, lie for any thing, which the Plaintiff cannot deliver p. p. under the execution - or which is the same thing, for any thing, or which an entry on fact cannot be made. 3 Bl. 200. Cro. 492. Brownl. 17. 2 Bac. 160.

In general, therefore, it will not lie to recover in corporeal hereditaments - or things lying in grant merely. 104 427. Bull. pp. 1. 2. 105. 7. 106. 8. Cro. 2. 203. Cro. 7. 140. S. 107. 200.

of Judgment & Discretion.

But it will lie for land laid out as a highway in
favor of the owner of the soil; as the proprietors in So. U.
cont'd, Stiles vs. Burdett 5 C. Aug. 1809 & C. of E. 1810. In laying
out a highway does not debase the right of soil. But the
land is recovered ~~subject~~ to the easement. Exp. 428.390.1.
18 Bur. 142, 1000 118. 3 Bur. 54. 118 1004. This appears to be.

Is it lies in favor of the grantee or owner of her-
bage of land, tho the soil belongs to another. (2 Bro 167. Cro.
C. 162. Shaw. 112 & Hard. 303. 401. & 404 &c. belongs to the former,
till the crop is taken.

But it lies not for a watercourse, a stream, a gully,
or ravine - for it is fluctuating & depth cannot be given. It
 sh^d. be bred for so much land covered with water. 2 Bar. 187.
 2 Bl. 143. Esp. 428. Poph. 167. 2 Bl. 18. Brownl. 142.

1/p.3. The action need not be for an entire thing, e.g. *Kent*
lie for a certain part of a close or building. 3p. 428. *Wm* 695.

Who may have the action.

General rule: No person can maintain an action, unless he has at the time a right of entry, (the action being founded on a right of prop^y.) for tho' the Lessor of prop^y is sup- posed to have entered, & made a lease, yet this fiction will not aid him, nor is an actual entry, if he had no right to enter: Hence the possessory title only is triable by ejectment.

38M. 205. Est. 430. 447.8. W. Jones 196. Litt. S. 595. 38C. 179. 180. 191.

2 Bac. 100. worn 6. 08. 10. Mod 177. The ultimate right of property in *Lepus* is tried in Eng. by a real action. 3 Pl. 100. 170 & ult.

E.g. Tenant in tail, alienes in fee & dies, it is a discontinuance & he can
cannot releas. Of course he cannot maintain ejectment. 2 Bl 1742, 1742.

Ex. p. 421. Litter § 595. This rem. dy is by an action, recd. 3. M. 1910.

Of Ejectment & Disfranchisement.

So if the Lessor of p^{oss} or those under whom he claims have been out of p^{oss} 20 years in Eng^d while having the right of p^{oss} he is barred of his action by the Stat. of Limitations 21: Jac. 1. which takes away his right of entry. Esp. 4312. 3 M. 208. 2 B. & C. 160. 172. Bull. 102.

Our Stat limits the right of entry to 10 years after the title accrued Stat (284) 434. d.

Both States have the usual savings in favor of infants, fumes court, persons insane, imprisoned & beyond sea. Stat. 435. 3 B. & C. 503. - In Eng^d ten years are allowed after disabilities removed - in Con. 5 years. Idem. Decided in Eng^d that successive disabilities cannot be joined within 5 saving clauses. 6 East 80. 4 M. & S. 12. 182. Bush v. Bradley & Co. contine.

If the Stat. has begun to run, a supervenient disability will not save the title - the disabilities in p^{roviso} being only such as exist when p^{right} of entry first accrues. 4 M. 300. 6 East 83.

The p^{oss} or entry of the Lessor of p^{oss} under the Eng^d Stat. must be an actual p^{oss} & not presumptive & that if he cannot prove a p^{oss} in fact within 20 years he must be non-suited. Esp. 432. Bull. 102. Shaw 1042. Sal. 421. Idem. if no other person has been in p^{oss}? 3 M. 206. In case of vacant p^{oss} no person will be lib. in to defend. Esp. 433. B. & C. 129.

This rule is not adopted in Con. There a right of p^{oss} is decreed, even in trespass, & equivalent to actual p^{oss} provided no change of p^{oss} - & the right of p^{oss} itself is a suff. ground, on which to found this action. This page 16

179. If the owner brings ejectment within 20 years, & is non-suited, that does not prevent p^{Stat} from running Esp. 432. Shaw 1042. n.

Of Ejectment & Disseisin.

An undisturbed possⁿ for 20 years, in Eng^d or in Cos.
is not only a good defence to the action, but a suff^t ground,
on which to support it. esp. 432. 70 R. 442. 3 Bac. 504. Sal 421.
Possessory title acquired by occupant.

In Eng^d however such possⁿ confers the possⁿ & title
only. 3 Bl. 179. 180. 190. 2. Esp. 447. 8. East. pm.

In Cos. such possⁿ carries with it a complete absolute
title. This I suppose is upon the principle that who has
the title, has without entry the possⁿ in Law, where if by a
possⁿ is lost, the title is lost with it. 10 Root 50. 68. 151. 422. 154. 383.

Successive seisin in continuity, for 15 years, being a
ment. (C. in Cos. - for possⁿ must have been possessed within
15 years.) Bull 102. 4 Bur. 2437. Hard 461. Esp. 431. 2. - Qu. does
this confer a title on last disseisin, so that he can maintain
the action?

But the possⁿ which bears an ej^t or gives a title
under the Stat. is an adverse possⁿ only - if not adverse
the Stat. does not run. Ex. one joint tenant or tenant
in common is in sole possⁿ for 20 years not bar to the
other. So, if mortgagor remains in possⁿ as mortgagor (Esp
433. 2 Bac. 171. 2. Sal 423. 2. Ray. 140. Sal 285. 3 East. 277.
5 Bur. 2604. Co. 2. 95.)

In these cases there is no presumption of ab^uderⁿ.

But adverse possⁿ by one tenant in common, is
"sufficiently" long. 218. Sal 423.

If then two, or joint tenant or tenant in common
endeavour to hold the whole estate by possⁿ he must prove
seisin & adverse possⁿ of 20 years. Since his possⁿ is that of his
companion. Esp. 434. 3 Bur. 2006. Co. 2. 102. 2 Bl. 180.

Of Ejectment & Disseisin.

But what shall be deemed an adverse possⁿ in such case, is a proper Q^u. to be left to the jury - who may presume an ouster from great length of sole possⁿ. esp. 434. Coups. 217.

If the party in possⁿ claims under the party out, there is no title acquired by t. possⁿ - not adverse - t. own is not barred. Ex. Tenant at Will or for years in possⁿ 20 years, lessor not barred. Esp. 435. Bull. 103. Sec. 1 Rost 68.51. & q^u. 4222. & Bryan v. Armitage C. of E. 1811.

2 p. 1.

So possⁿ by particular tenant does not run to remainder man or reversioner. (Coups. 218). The has not t. right of possⁿ.

And when adverse possⁿ is relied on by tenant at will, there sh^d be some proof of actual ouster - the presumptions evidence of the fact arising from circumstances may go to the jury. Esp. 435. Bull. 104. 1 Roll 659. - Ex. Tenants declaring that he holds under a Stranger.

But it has been holden that the tenant with^o having taken a lease from a Stranger, is no evidence of adverse possⁿ unless the latter has actually ousted him or entry. Esp. 435. 1 Roll. 659. (Sed Qu.) Possⁿ by a Stranger under a claim of right is adverse. 3 East. 297.

If the action is founded upon a clause in a lease giving a right of re-entry for non-payment of rent &c. actual entry is not necessary to maintain the action. Esp. 435. Doug. 460. 3 Bur. 1897. esp. 451. 1 Sand 319. n. 1. Bull. 103. - Confession of lease, entry & ouster, suff^t. - The same former opinions appear to have been the other way. 2 Bur. 172. Sand 319. 1 S. D. 233. 1 Vent 42. 332. 3 Keb. 218. Sal 240. esp. 450.

And the last rule is general when an entry is necessary to complete plaintiff's title. Sums, when necessary to rebut def^t's title.

Ejectment & Disseisin.

as to avoid a fine. - Here actual entry is necessary. Doug 467.
Esp. 400. ^{450.} Sand 319. n. 1287. n. 303. 1827. Bull 103. Shaw 1086. Tal 259.
In the former case the right accrues upon the act, count or
contingency - in the other upon the entry, post 33.

Who can maintain the action? He, who
has the legal right of propⁿ. Thus Mortgagee may maintain
this action, either before or after the day of payment, not
only as mortgagee but as Mortgagee's Lessee, also, as well as as
a Stranger Doug 26. Esp 405. b. "Mortgages" p.

Same rule in favor of mortgage assignee. - This assignee.
Esp. 436. Tal. 245.

But if lands leased are afterwards mortgaged, & mortgagee
cannot evict the Lessee, his is the elder title. But in Eng.
mortgagee is allowed in such case to proceed as Lessee by estab-
lishment, if he has given notice to the latter before action brot.
that he does not intend to disturb his propⁿ, but merely
to secure the rent. This is allowed, as the coercive means
of securing the rent. Esp 435. Doug 23. 269. "Mortgages"

2 p. 2. So mortgagee may recover in Ejectment tho' if mortgage
money has been paid, if it was not paid at a day - for he
has the legal title. Woodm. & v. Rice S. C. Feb. 1808. 2 Day 151.
Poult. M. 214. 5. 1 over 187 2 H. 30. 159. 274. Ward 318. 10 T. R. 700. arg?
1 Eq. C. ab. 322. ("Mortgages") vid. Shaw. 413. Esp 458.

And it is a general rule that the person in whom the
legal estate is, shall recover in ejectment. (10 T. R. 2. 122. Bull 70.
Doug 20. 10 T. R. 700. n. 2 H. 384) - tho' if equitable interest may be
in another, or in dispute himself.

In some modern cases however, etc. of law having been
altered.

Of Ejectment & Disfeisin.

= what relaxed the rule, & taken notice of trusts, or equitable rights under special circumstances. This principle of these cases, has however, been questioned (See Com. 473. 597. Doug. 22. 695. 747. 15th. 522. 735. 2 Hb. 693. 6. 1 Hb. 334. 447. 7th. 347. 663. 8 Hb. 516. Chie. 5. 112. Kirk. 378. Esp. 458. 7 East. 23.

In general the p^lff must recover by the strength of his own title, - of course a recovery may be defeated by proving the title in a 3^d person. Rule. 110. 4 Bur. 2487 Esp. 455. post 3.

(See 2 Day 227.

But this cannot be done, when the p^lff's title is derived from the defe. - or when defe. holds under title derived from p^lff. - In both cases the doctrine of estoppel applies. Mortg^{ee} vs Mortg^{or} - Mortg^{or} vs his own L^{ep}. 15th. 760. 7 T. R. 480. Esp. 457. Bull. 110. 1 Root 222.

Upon the same principle if B. claiming under A. leases to C; in ejectment by A. vs C. the latter cannot dispute A's title. 7 T. R. 488.

2nd. Devisee of a term may maintain Ejectment, but not in eng^d title if Ex^{or} has assented to it (Esp. 430. Sh. 70. vid. Com. 288. Cooper, 190. 1. 1 Sen. 129.) the legal title being in the Ex^{or}. Cow. D. 188. 10 W. 544.

Qu. Is Ex^{or} assent necessary in Com? Actions for Legacies always lie in our Cts. of C. S. - Tho' of the Legacy is not specific, distribution is first necessary.

But when a freehold is devised, devisee may recover it immediately on testator's death. - It is assent necessary. - Ex^{or} has no concern with it, & the heir's title is gone. Esp. 437. 608. 240^c. Devisee has immediately & legal title. See 15th. 190. 193.

Assignee of a bankrupt may maintain the action

Of Ejectment & Disseisin...

for lands, which belonged to him. 20p. 437.

So of Ejectmt. or disseisin in Cor. (Barstow v. Adams. C. of E. June 1805. This was disseisin. 2 Day. 70.)

The Committee of Lunatics cannot maintain ejectment for the lands of the lunatic. It sh^d. be in the latter name, for the title is his - & committee cannot make a necessary demise - being only a bailiff or agent. Esp. 438. 760b. 215. Hunt. 10. 2 Wils 130? (The lease is made of lunatic's land, by committee under an order of Chy. 2 Wils 131.

In Cor. the action must be in the name of lunatic suing by his conservator. Stat. C. 380. 4) no need of lease.

An Ex^{or} may have & action for an ouster either of his testator or of himself, where the testator was alive for years it being a chattel interest. Esp. 439. 4 Co 95^a. 2 Vent 20.

So of an Adm^{or}. Esp. 439. 3 T. R. 10.

If one is disseised of an estate of inheritance & dies, the remedy belongs to his heir. Co L. 104^a. Cor. D. 565. b. 213a. 23. 304. 180. 2u. For the disseisin of & ancestor? But he cannot derive title from an ancestor who was never seised. 2 M. 209. Co L. 116. 15. a.

In Cor. the heir may support the action, tho & ancestor was never seised. The maxim "disseisina facit stipitem", is not adopted here. 3 Day, 160.

An alien cannot maintain this action, for he cannot hold lands. Esp. 439. 4 T. R. 300. 2 M. C. 249. 274. 293. Co L. 3. d. 2. 124. 1 Bac. 4. 80. 4 T. R. 198. 7 Co. 10. (Platons in some of & statutes varying the rule. Encyclop. 2d edit. "Alien".) Lewis, I suppose who naturalized under laws of U. S. Stat. U. S. vol. 7. p. 130 ed. 5. p. 470. 4 p. 133.) An alien having a tenor in a house may maintain ejectment for it, & conclude. 2 M. 243. Title by Deed. p. 2

Of Ejectment & Deposition.

A lessee for years may maintain ejectment & depose himself - the former having the present right of possession etc. - 180. 190. 1. 157. 8.

In Con. if several tenants in common join in action of deposition, a nonsuit of one will not bar present title & recovery. So of a release by one to p. def. The others may still proceed for their shares. 2 Lw. 73.

Of the Pleadings.

The declaration sh^d. state p^lffs title as it is - & sh^d. shew a subsisting title at p. time of p. action brot. If he has no title at that time, he has regularly no right of recovery - Esp. 444. 459. 1 Sid. 7. 1 Sta. 555. 3 Wils 274. 4 T.R. 580. Bull 105. Esp. 447. 8. 1255. 3. 1.) - tho if he states a longer term than he has, he may recover. post. 3. 1. 3.

But it is not necessary in p. Eng. l. action to state the p^lffs entry on a day certain; suff^{ce} to set out his title, i.e. the demise, & avow that he afterwards entered - for so are the precedents. (Esp. 445. Besides the entry is not traversable. Def^t. must confess lease, entry & ouster.)

In Con. not necessary to state an entry by p^lffs or Eng? - suff^{ce} to avow, that at such a time he was seized, or possessed as p. case may require. (void of a present p^lffs of a term for years.) & that at such a time def^t dispossessed, or

The ouster sh^d. be laid as subs^{eq}t. to p. recovery of p^lffs title - seems no cause of action. Esp. 445. 1 Sid. 7. Bull 105. Cro. 70.

The particular day of p. ouster, it is said, need not be stated i.e. no particular day need be stated - suff^{ce} if p. ouster appears in p. declaration to have happened after p^lffs title arrived & before p. suit brot. Esp 445. 0. Cro. 71. but it is usual to state

Of Ejectment, & Disseisin.

a day certain. Qu. Is not the omission fatal, or species demur-
rer? Not traversable, (supra),

3 p. 1.

The Land or subject sued for must be so described in p. declara-
tion, that the Plff may know of what he is to deliver possⁿ
on the writ of hab. fac. possⁿ - verum p. declaratⁿ is ill. 2 Burr. =
158. 2 L. Ray. 1470. Comf. 350. Cro E. 349. Cro E. 471. 3. Sal. 254. Term.
834. 909. 1 Burr. 630. 1 T. R. 11. 5 Burr 2670. 1 East. 441. 3 Wils 23. L. Ray. 101.

Great precision was anciently necessary - but p. rule
is now much relaxed. (Comf. 350. Esp. 448. 1 Burr. 622.) for p. l^{or}
of plff is to show p. land to p. Plff. at his point. Itw. 71. 1003.

In Cor. the subject is usually described by a designation
of the Town &c. in which, &c. & of the boundaries of p. land. to-
geth^r with a statement of p. exact or estimated quantity.
The quality or kind of Land, is not mentioned.

In Eng. the boundaries are not usually given - but the
Parish in which &c. - the kind of Land (as arable meadow &c.)
& p. quantity (i.e. some certain quantity) are required to be
designated. Esp. 440. 7 T. R. 333. 5. 2 M. R. 706. Carth. 204. 11 Co. 55.
Bull. 109. Sal. 254. 1 Sid. 295. 3 Wils 23. - If land in a wrong
parish, plff cannot maintain p. action, Doubl. - So in Cor.
I suppose if land in a wrong town, 2 East. 497. 2. 501. 2. 2 M. R. 706.

But plff is not bound to declare for p. exact quanti-
ty that he is entitled to recover; for he may sue for a cer-
tain quantity & recover so much only as he proves title to.
Esp. 447. Cro E. 13. 2 Mol. 734. 3 Lev. 334. Comf. 260 (2.) -

(But he can recover no more than he declares for; tho he
may recover less Esp. 447. 1 Burr 324. So, in p^ro^o actions - So if he declares
for a larger ten^{or} p. he has, he may recover; for p. Q^u is whether he has p^ro^o
sufficient right to p. subject sued for. Esp. 447. 8. Bull 108. post p. 3.

Of Ejectment & Disfranchisement.

3p.2. Tho the Defc. in eug. has confessed lease entry & ouster, he may still deny that he is in possⁿ. & if plff cannot prove it, he must be nonsuited. Esp. 455. 12 Wils 220. Bull. 10. 7 T.R. 327. 11 B. 100. 570.

In Con. also plff. must prove Defc. possⁿ.

The general issue in disfranchisement, is no wrong nor dis-
franchisement. 3 Bbl. 305.

In Ejectment - not Guilty. 3 M. app. 18. 18.

Judgt. on a plea of title in trespass is no bar to an
Ejectment - a higher action. Kirb. 395. 2 Sa. 79. 2 B. 7 T.R. 354.
Stat. c. 425. du. This seems not Law. Trespass 72. 3 East 346.
Law. Ev. 21. 175.

The C. L. requires Defc. to plead & genl. issue. 3 M. app. 18.

Of the Evidence.

The plff in ejectment must recover by & strength
of his own title - not by & weakness of Defc. Good defence
to prove & title in a Stranger. Esp. 455. 4 B. 2484.
2 T.R. 749. 4 W. 682. ante 2. 2. 2 Day. 227.

But the title proved in a 3^d person must be a good
& subsisting title, or it is no defence - Ex. Defc. produces
an old lease to a Stranger - not suffc. unless he proves pos-
session under it within 20 years - a supposed title not
suffc. Esp. 456. 7. Bull. 110.

When a lease is void or voidable, possⁿ. may be re-
covered or lost by this action - But it often happens &
& plff destroys his right of recovery by some act, affirming
the lease (Esp 404.) or waiving his right.

Rule: If a lease is void, no act of & plff will affirm it. Ex. Consent
for life which is in fee. it is void - acceptance of rent by & remainder
man, does not vit it up. Doug 50. Esp. 464. Conf. 432.

Of Ejectm^t & Disposition.

3 p. 3

But if the lease is only voidable, there may be an implied confirmation of it by the acts of the lessee of *p. p. 44*.
e.g. Lease on condition that if lessee assigns without his
lessor's consent, the latter may re-enter. This is only voidable,
not *ipso facto* void.

When ~~made~~ acceptance of rent by him of lessee after
notice of the forfeiture, is a confirmation of the assignment -
a waiver of *p. condition*. *Esp. 465. Co. L. 211. 3 Co. 84. Comp. 803. 483.*

If *p. p. 44* sets out *p. abutments* of his close, he must prove
them as *land*. But if an abutment is laid "East" provided
it is *n. e.* is suff^t. *Esp. 417. Y. lo. 114. 2 Rot. 677. "Trespas" 77.*

Of the Verdict, Judgment &c.

The *p. p. 44* in this action may recover according to the title,
which he proves the diff^t from that laid in the declaration.
e.g. Where having title for 5 years or, he declares for *Sever*.
20 p. 490. 447. ante 3 p. 1

So if he declares for a certain number of acres & proves
title to a less *n. only*, he shall recover the latter. *Esp. 490. Comp. 460. ante p. 3. 2 Rot. 177.*

So if he declares for several things, as a house & land he
may recover one & not *p. other* & the *p. declaration* sh^d be it
as to one, it may be good, & *jud^t rendered*, for *p. other*. *Co. L. 186. Esp. 490.*

If *p. p. 44* declares for land only, he will recover with *p.*
land all *p. buildings* upon it. *Esp. 491. Dy. 47. w. They being in the
land in the word "land". 2 Rot. 17. 18. Co. L. 4.*

If *p. p. 44* recovers *jud^t* he has a writ of habeas corpus under which the
diff^t is put back in *p. p. 44* & he has all others out. *Esp. 491. Co. L. 186. 2 Rot. 17. 18.*

Of Ejectment & Disposition.

2 p. 4. In the execution of this writ the Plaintiff may break doors of a dwelling house, if it is necessary. As when a house is recovered & writ cannot otherwise be executed, if he is desired admit tance, 2 Bac. 179. 5 Co. 91. (Trespason Land & 3.4) Sheriff's p.

The plaintiff's having taken possession pending & suit does not prevent his recovery. He may still have judgment for damages & costs. 1 Root 73.

In Eng. it may, indeed, be pleaded in bar, but after issue joined it is discretionary with the Judge to admit & plea or not. Esp. 454. 4 Geo. 180.

So if the term for which the action is brought expires pending the suit, plaintiff has judgment for damages & costs. Esp. 492. 7 T. R. 328. Sha. 1056. 2 Bac. 177. Co. L. 285.

If after plaintiff is put into possession the defendant turns him out, the former may have a new habeas corpus. Or an attachment against him for contempt. Secus, if evicted by a Sheriff. 2 Bac. 180. 1 Keb. 279.

In the Eng. action of ejectment if verdict is for defendant, & he will seldom, if ever, grant a new trial. for plaintiff may bring a second action - no necessity for a new trial. 5 Bac. 253. 4 Burr. 2224. Sha. 1106. 1 Barnes 323. Esp. 493. Judgment on first, no bar, the parties being fictitious.

But if verdict is for plaintiff, a new trial may as easily be obtained as in other actions. to prevent the charge of possession. And possibly defendant's possession may be his only title, in which case his bringing a new action might be of no avail. 5 Bac. 254. 4 Burr. 2224.

It is only to be said that a new trial cannot be granted in any case of judgment. 5 Bac. 253. Tal. 698. 690. 2. Ray. 514. 1 Root 100. h.

Of Ejectment & Disposition.

In Com. N. E. is granted, as in other nations: one judge being a bar to another action, between the parties, as to same title.

Of the recovery for mesne profits.

The verdict in ejectment, when in plaintiff's favor, having established his title, it follows that from the time of the dispossession plaintiff has been a trespasser. 2 Bac. 181. Esp. 494. 2 B. & C. 205. See Trespass 2.

After a recovery in ejectment, therefore, plaintiff may have an action of trespass to the defendant, to recover damages for the latter's unjust profit. This is called trespass for mesne profits, & the damages recovered are the value of the land during the plaintiff's possession. (Esp. 494. 3 B. & C. 205. 2 Bac. 181. Gal. 638. Cro. E. 182. 3 Wils. 121.)

Said with a continuance &c. (Bac. 181. 2 Barnes 368. par. 32.) & the order & whole case may be stated specially (Tresp. 6. 1) & Ray. 277. Lord. up. 502. This action is incidental to a recovery in ejectment. 3 Wils. 121.

It is said that plaintiff may if he so elects, bring a bill in Chancery for an account of the profits. But this is not usual. 2 Bac. 181. 1 Vern. 105.

The necessity of this second action arises from the circumstances, that in ejectment the damages are nominal. 3 B. & C. 205. ante 12. 3 Wils. 119 arg. But it has been held that plaintiff may recover his actual damages in ejectment. 2 Bac. 181. 2 Barnes 59. (Carr 205.) & in the full damages were recoverable.

Said contra: that the whole damages cannot be recovered in ejectment, because the action is not laid with a continuance. 2 Bac. 181. R. H. by carrying the ejectment with a continuance, plaintiff might recover the whole damages: he would be obliged to prove an actual injury. Trespass 2.

In Com. there is no doubt that full damages are recoverable.

Of Ejectment & Disseizin.

our practices, may be recovered in *f. ejectm.* Allowing
the *2^d* action seems therefore impolitic, but it is established.
2^d Sometimes full dam^s are recov^d here in *f. ejectm.*

In this record action, it is not necessary for *plff* to
prove *f. entry* of *df*. The recovery in *ejectm.* is conclusive
evidence of that fact. 20 *Dac.* 181. n. 8 *kin.* 424. 5. *Att.* 222.

f. d. 2. The *plff* is not, however, confined to the time of *f. lease*
construed as laid in *f. declaration* in *ejectm.* He may recover
an antecedent profits if he can prove antecedent title,
an antecedent profits by *df*. *Exp.* 494. 50 *M.* 205. (Bull 89. 2 *Dac.* 181. cont. *pro.*)

But this distinction must be noted: If he sues only
for the profits, accrued since *f. lease* laid in *f. declaration* in
ejectm. the record in that action is conclusive in his fa-
vor; but if he goes for antecedent profits the *df* may, as
to them, controvert his title. The record does not prove
it. (30 *M.* 205. *Exp.* 494. 2 *Dac.* 181. n. 3 Bull. 86. - In the former case
proof of the judgment in *ejectm.* & of the execution of the writ of *pos.*
is suff^t 30 *vols* 121. *Exp.* 494.) i.e. suff^t proof of his right to recover
for the profits accrued since the demise.

So as a present occupier the first record is no evide-
nce. It is *res inter alios acta*. *Plff* must prove his title.
Exp. 494. 1 *Sid.* 234.

The *Plff* having regained *pos.* that *pos.* is said to
have relation to the time of his title accruing. This gives
him a right to maintain his *pos.* for the intervening time.
Exp. 494. 5. 2 *Dac.* und. 2 *Dac.* 367. *Trasp.* 2. 1.

This action is however within the purview of the
Stat. of Limitations the *df* may therefore protect himself as to
all the record profits, except what have accrued within

Of Ejectment & Disfranchisement.

Six years in Eng. or 3 in Con. Esp. 495. Bull 88. H. C. 273.

Suppose p^lff in Con. goes for full damages in the
ejectment - can deft avail himself of the Stat. as to the
amount of damages?

In Eng. the action may be brought either in p^r name of
the nominal p^lff. or of the lessor of the p^lff. Esp. 495. 3 Bur 565.
3 Bl. 205. Bull 89. - And if the nominal p^lff releases p^r action
he is guilty of a contempt. 2 Bac. 182. n. Gal. 281. Skin 247.
Will not p^r C. forbid deft. to plead it?

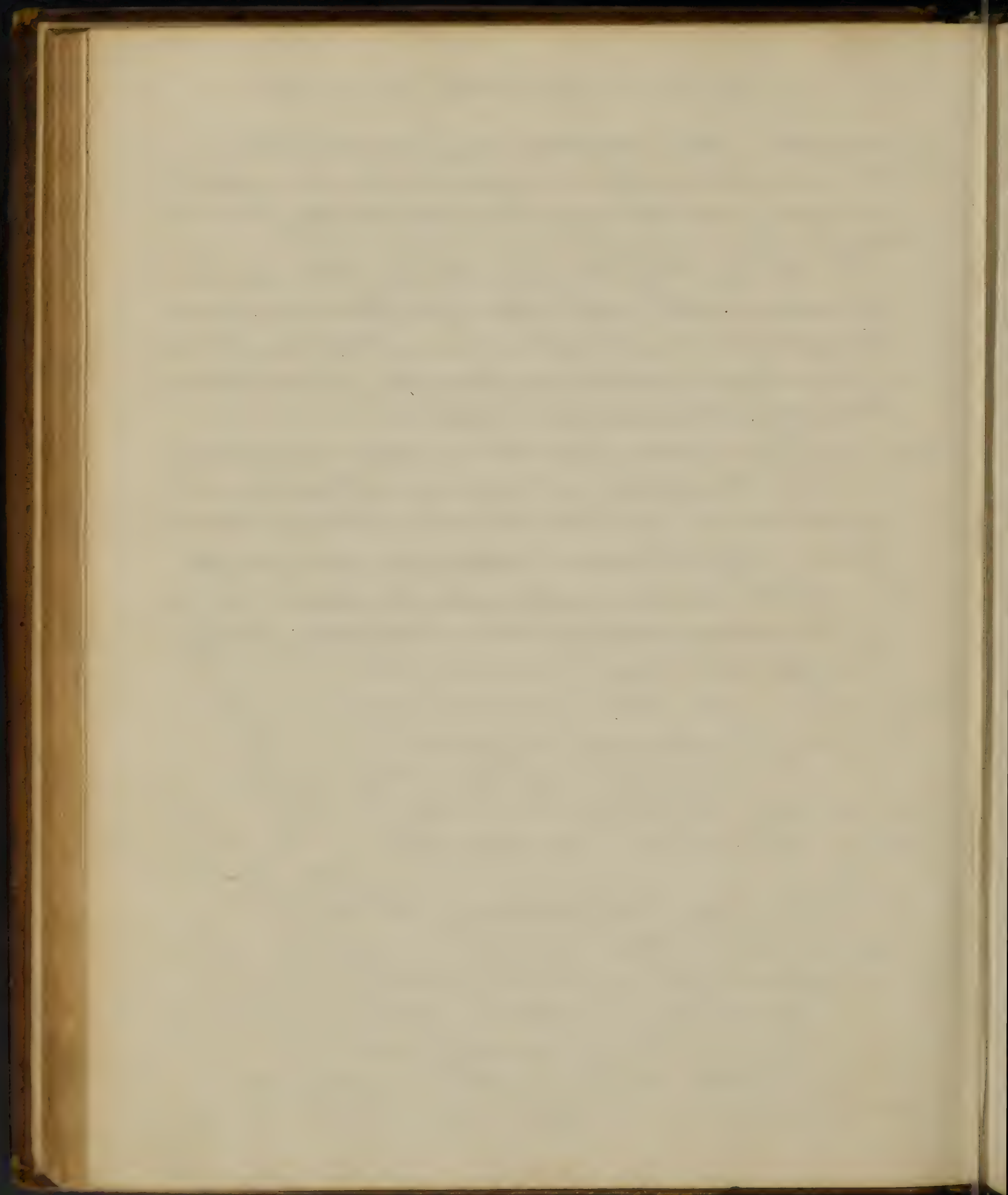
Thus in common cases one tenant in common cannot
maintain trespass in common, yet after a recovery
in ejectment he may have this action, it being incident to
the former Esp. 495. 3 Wils 118. Litt S. 323 con. "Est? in severalty?"

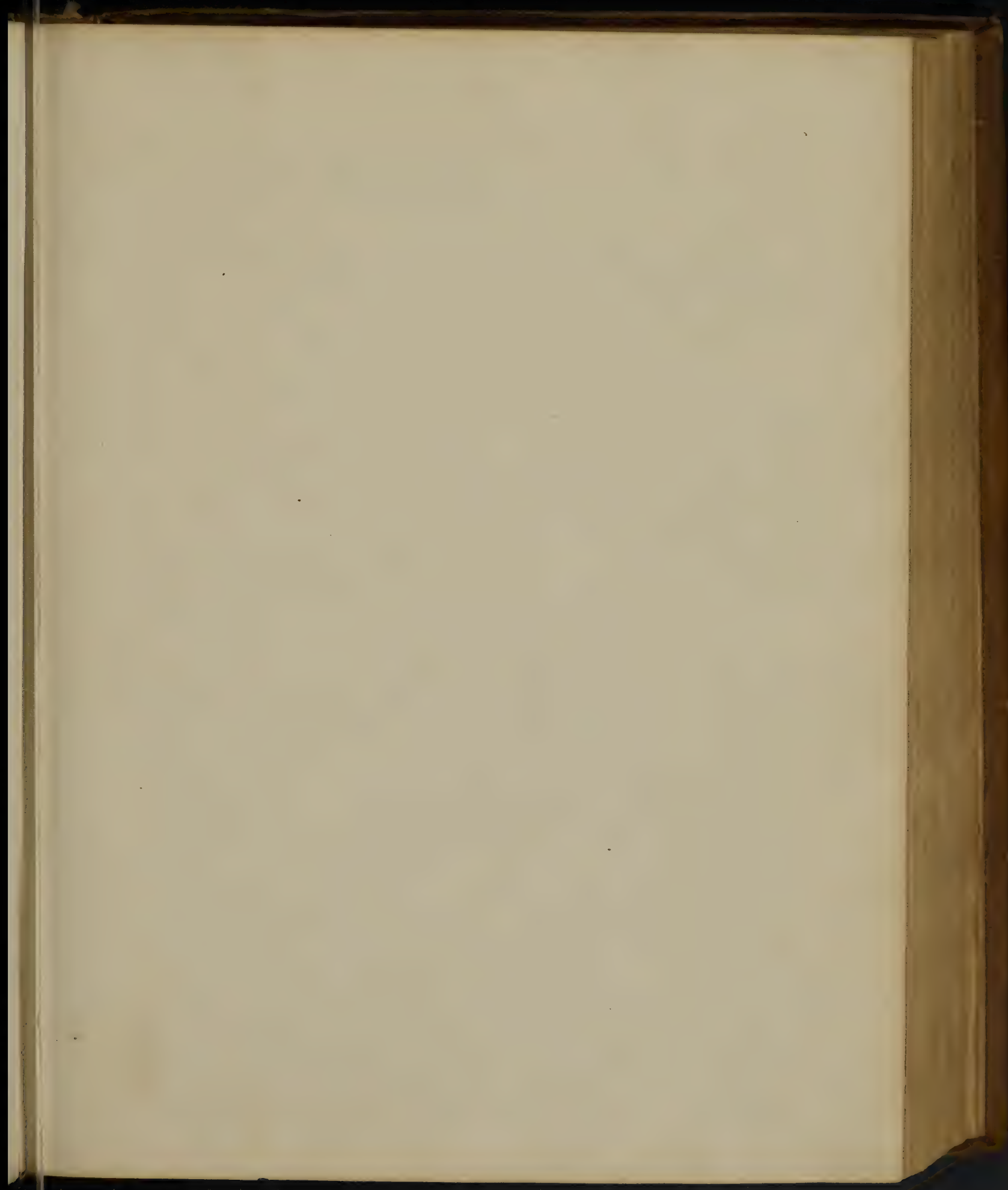
4 p. 3.

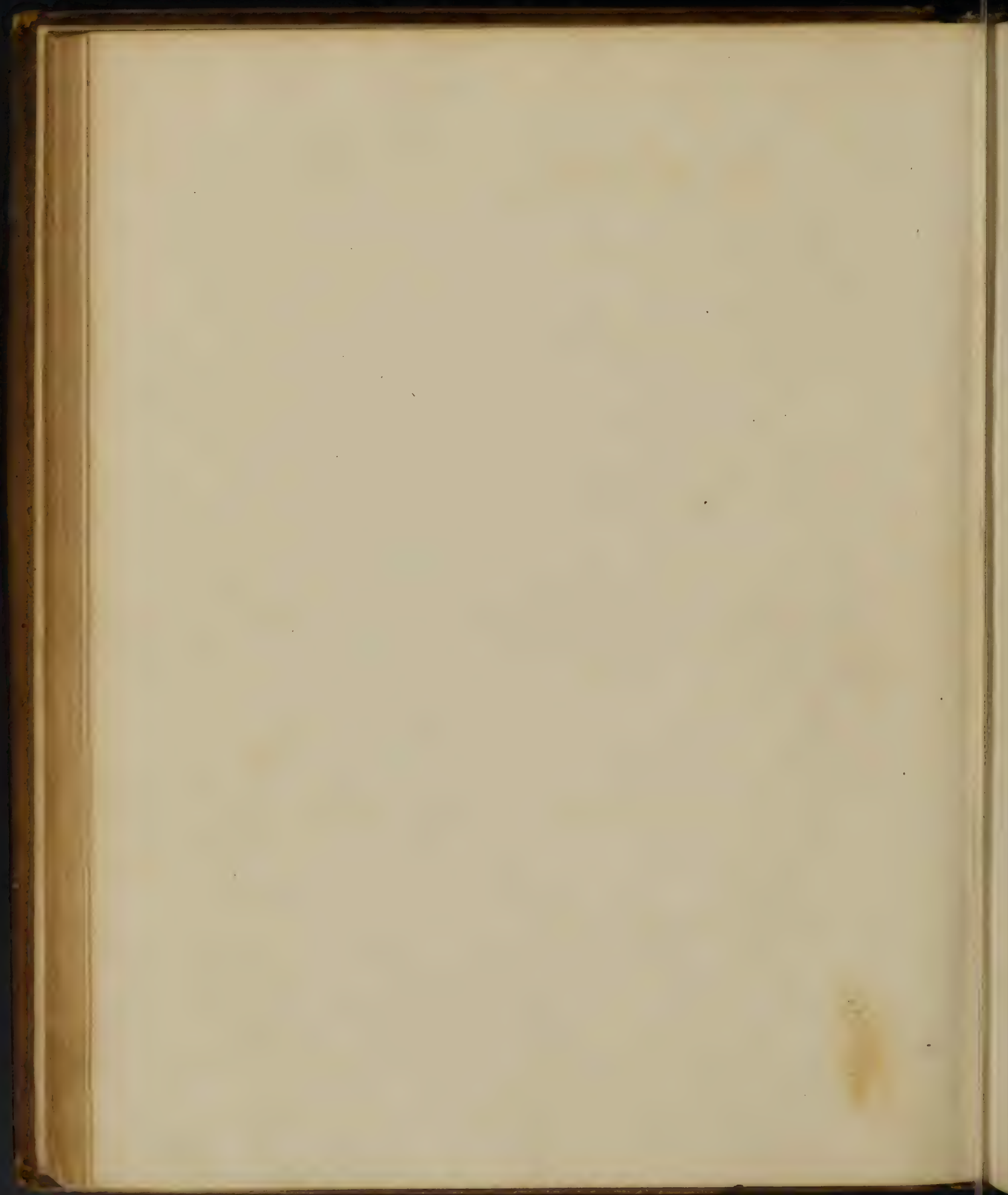
In the action for mesne profits the trespass is laid with
a continuance. 2 Bac 181 n. 2 Barris 368. ante 4 p. 1. Esp. 408.

"Trespass" 5. 4. 6. 1.

Finis







Of Waste.

Waste is any spoil or destruction in houses, lands, trees, or other corporeal hereditaments, to the disherison of him who has a remainder or reversion, in fee simple or fee tail. 2 Bl. 281. Co L. 53. 5 Bac. 455. 3 Bl. 220.

There seems to have been formerly a distinction between waste & destruction - not attended to now. Co L. 53. 5 Com. 677. 679. 1000. 10. 4. 1 Mer. 76. E. L. 386.

Two kinds: voluntary & Permissive. Voluntary is that which is occasioned by positive acts of spoil or destruction - an offence of commission. Permissive is that which happens thro' negligence - an offence of omission. 2 Bl. 281. 5 Com. 677. 5 Bac. 457. Co L. 53.

Covenant by Lessee not to do any waste, is broken by Permissive waste, &c. - 5 Bac. 457. Dy 281. pl. 21. 2 Hol. 146. &c. Condition that if Lessee do any waste, Lessee may re-enter. House falls for want of repairs &c. &c. Lessee might make.

What amounts to Waste & what does not?

In general whatever works a lasting injury to an inheritance is waste. 2 Bl. 281. 5 Bac. 457. 2 Sw. 81. (definition supra.)

1. In Houses or buildings: Demolishing or burning a house &c. is waste - voluntary. (5 Bac. 461. Co L. 53. Com. Waste, 2. 2) Removing boards, timber floor, or any thing once fixed to & part of of a house. 2 Bl. 281. 4 Co. 64. 5 Bac. 462. 3. 2 Rod. 815. 77. a door a window. a hearth. a shelf &c. Co L. 53. Co L. 329. 379. 2 Buls. 113. (voluntary.)

Removal by Lessee, of things annexed to & part of by himself, is waste. Ex. wainscot, bench &c. for it is part of building.

Of Waste.

5 Bac. 463. Co L. 53rd 4 B. 64) Voluntary. Moor 177. 2 Com. 677.

There is generally nothing is waste, except what works an injury to the freehold; yet changing the structure & use of a building by lessee is waste, tho advantageous to lessee. Ex. converting a corn mill into a fulling mill - tho \therefore value is thus increased.

So converting a brew house to other uses, more profitable. 5 Bac. 457. Cro J. 182. 2 Rol. 814. 1 Lev. 309. 311. 1 Mod. 24. 2 Bl. 222. Com. Waste D. 2.

1 p. 2. Suffering a house to decay, for want of necessary repairs, is waste in \therefore tenant - permissive - for he is bound at his peril to keep \therefore house from wasting, (Co L. 53rd 5 Bac. 461. 2 Rol. 815. 5 Com. 677.) unless exempted by contract.

Lessee is liable in \therefore last case, tho there is no timber on the land demised. It is at his peril. Co L. 53rd 4 Bac. 461.) Lessee, if the lessee has cut all \therefore timber since \therefore demise. 5 Bac. 465. 2 Rol. 822. Moor. 7. Com. Waste D. 2.

Building a new house on land demised, when there was none before is not waste, Comb. 5 Bac. 461. 2 Rol. 815. Hob. 234. Co L. 53rd contra. See Com. Waste D. 2.

But Lessee may not take Lessors timber or other materials to build or repair it - It must be altogether at his own charge. Hob. 234. 5 Bac. 466.

But if lessee, having built a new house (ut supra) suffers it to decay, he is guilty of waste: for it becomes part of \therefore freehold. Hob. 234. Co L. 53rd Com. Waste D. 2.

If lessee builds a new house after the demise, lessee is not bound to keep it or repair - therefore not liable in waste, for its decay. (Hob. 234) for it was not part of \therefore land demised.

If a house ^{was} was insured at \therefore commencement of the lease, its decay for want of covering is not waste in lessee. Co L. 53rd Cro J. 182. 5 Bac. 461. Com. Waste D. 2.

(Of Waste.

As to the burning of a house thro negligence or by accident: was waste in the tenant. He is now excused in Eng. in case of an accidental burning by Stat. 6 Ann. 5 Bac. 462. 2 N. 281. We have no such Stat.

The destruction of a house by the act of God (as lightning &c) or by public enemies is not waste in a tenant. 5 Bac. 464. 474. 2 N. 200. Co L. 53^a. Com Waste E. 5.

But if the house in the last case, be left standing, & tenant must repair it in a "convenient" or reasonable time: otherwise, if it suffer farther ^{lasting} injury for want of repairs, he is guilty of waste. 5 Bac. 464. Moor 62. Co L. 53^a. 10 Co 139^t. Com Waste E. 5.

If the tenant commits or suffers waste in houses, yet if he repairs them before action brought, no recovery can be had of him. But he must plead & subsequent repairs specially. Co L. 53^a. 5 Bac. 462. But he may not take lessors timber to repair, after actually suffering waste, ^{see post p. 4. top.}

2. In Lands: Digging up & carrying away of soil, by tenant is waste. Com Waste D. 4. 2 Rot. 816. 815. So suffering a well to be ruinous, in consequence of which the land is injured by the influx of water. 5 Bac. 458. Co L. 53^b. 2 Rot. 816. 5 Co. 878. Moor 152. 73. Com Waste D. 4.

1 p. 3.

Secus, if the water be suddenly swept away by torrent or tempest; tho if the tenant does not repair it in convenient time, & further lasting injury happens, he is guilty of waste. 5 Bac. 458. Co L. 53^a. Com Waste E. 5.

All bad husbandry is not waste. - i. e. tenant suffers arable lands, thro negligence, to be overgrown with thorns not waste. 5 Bac. 458. 2 Rot. 814.

But generally the conversion of one species of land into another

Of Waste.

another is waste, &c. arable into woodland or &c. converso? meadow into arable & &c. converso. For it changes not only the course of husbandry, but the evidence of the identity of the estate. 2 Bl. 282. Hob. 224. Co L. 53^b. Com Wash D. 4. Moor 101. 2 Roll. 814. Co 815. l. 4.

Qu. as to the last rule in Com. The custom is, I believe, for tenants to change arable & pastures into meadow & &c. converso, at pleasure. Perhaps no change here w^d be deemed waste, unless actually & lastingly injurious.

If tenant for life &c. open new mines on f. land, he is guilty of waste, unless the mines themselves were demised. Co L. 53^b. 5 Co. 12. 2 Mod. 193. 2 Bl. 282. Hob. 224. 5 Bac. 450. Com Wash. D. 4.

But digging in mines open at the time of the demise, not waste. Com Wash D. 4. Co L. 53^b. 2 Bl. 282. 5 Co. 12. Tho the lease does not mention mines. 5 Bac. 450.

3. In Trees: If tenant for life &c. cuts down timber trees (except in special cases infra) he is guilty of waste. Timber being part of the inheritance. 2 Bl. 281. 4 Co. 62. 5 Bac. 459. Co L. 53^b. 54^b. Com Wash. D. 5.

So if he does any act in consequence of which f. timber decays. Ex. lopping or topping. Com Wash. D. 5. Dy 55^a. Co L. 53^b. So, if destroyed thro' his negligence. 5 Bac. 459. 2 Roll. 815.

By timber trees are meant, trees fit to be used in building. So that all trees are not timber. 1 Roll. 697. 2 Bl. 281. 5 Bac. 459. Johns. die. Cutting down shade trees near the house (tho not timber) is waste. Co L. 53^b. Hob. 219. Called by other destruction. Com. Wash. D. 5.

As to what particular kinds of trees fall within f. description, vid. 2 Bl. 281. Dy 55^a. Co L. 53^b. 2 Roll. 817. l. 12. 5 Bac. 459. Oak. Ash.

Of Waste.

Timber after the age of 20 years, are timber thro' the realm. Taken these are source, others are such by custom. 20. 36. 281. Moor 817. Cro. El. 531. 2 Rol. 814. Co. L. 53. Com. Waste. D. S.

Underwood tenant may cut at pleasure, if it be at a proper season. 20. 36. 281. 2. Rol. 817. 4. 53. 81. 2. 146.

Tenant is entitled of common right (unless restrained by express covenant) to such wood growing on p. land as is necessary for fuel, for repairing houses or fences, or for mending & repairing implements of husbandry. - Cutting this is not waste. 20. 36. 282. Co. L. 41. 5 Bac. 400. 456. The. 4. 53. 89. Cro. El. 534.

146. Yet if he suffers a house to become ruinous for want of repairs, he cannot take lease's timber to repair it. - Com. Waste. 5 Bac. 466. Co. L. 53.

He is guilty of waste if he cuts timber to make houses fences &c. where there were none before. Co. L. 53. 2 Rol. 822. 1. 35. Com. Waste. D. S.

So if he cuts for repairs, which are not necessary on p. want of which is occasioned by his own fault. 2 Rol. 822. L. 40. 38. Co. L. 53. Com. Waste. D. S.

So if having cut timber for necessary repairs, he sells it & appropriates p. avails to p. making of repairs, he is guilty of waste. Co. L. 53. 5 Bac. 466. Com. Waste. D. S.

Tenant is entitled to suff. timber for necessary repairs, even tho' he has covenanted to repair at his own charge: for the right cannot be taken away, except by express covenant. Com. Waste. D. S. Moor 28. In many cases p. tenant may cut timber for repairs, tho' not compellable to repair: &c.

Tho' the lessor covenants to repair. Co. L. 54. For p. mending of the land & for support of buildings & appurtenances. Com. Waste. (L)

Waste.

So, tho the lease^{was} "without impeachment" &c. & tho the house were ruinous, when the tenant entered, in which case he is not liable for its decay. Co L. 54th. 2 Rot. 822. l. 10. 222. l. 45. Com. Waste D. 5.

Destroying fruit trees in a garden or orchard is waste. Same if they grow upon other grounds (5 Bac. 401. Co L. 53th.) called in Coke destruction. 2 Rot. 817. l. 30. Com. Waste. D. 3.

Decided in Com. that tenant in down of a land, who had cut timber for sale, built a saw mill &c. was not guilty of waste. But Sup. Co. as a Ct. of Chy. will prevent unnecessary waste in such case by injunction.

Rules applying to Waste in general.

Breaking down ^{down} fences, ^{from} not itself waste, nor by 5 Bac. 401. tho its consequences may be. But destroying the fence of a park, or suffering it to decay so that the deer escape, is waste. 5 Bac. 401. Com. Waste D. 3. Dec. 53. Co L. 53th. 2 Rot. 304. 2 L. 222. 4 Ro. 240.

Tenant not liable for waste unless the value amounts to 40th Shilling - "De minimis lex non curat." May 4. Co L. 54th. 2 Rot. 824. 2 Rot. 228. Finch. L. 29. Com. Waste D. 1.

No person can be guilty of waste if the place in which is no part of the demise, or land holden by the tenant for life or years. E.g. Lease of a farm, except a piece of woodland, tenant cuts the wood not guilty of waste. Dy. 19th. Com. 690 Com. Waste D. 2.

But if there be a proviso that lessee may cut timber &c. is guilty of waste if he cuts it, for it is a covenant, not an exception as to the subject leased. Dy. 19th margin. Com. 690 Com. Waste. D. 2.

Waste.

And if tenant assigns exempting the wood or trees, & if assignee cuts the wood, he is guilty of waste, for as to f. before and parcel of the demise & the exception is void. 3 Com. 473, 681. 2 Inst. 302. Cro. E. 17. 583. 1 Leon 49. Com. Waste E. 2. 2 Rot. 454. for before has no such interest in the trees, as to support f. exception.

2 p. 1.

If a lease is made, with the clause, "without impeachment." the tenant is not liable for waste. Com. Waste E. 3. Moor 327 2 Inst. 146. 2 Rot. 835. Cro. E. 15. 2 Bl. 283. interference of R. & G. 1 p.

And this exemption can be created only by deed. Com. Waste E. 3. 2 Inst. 146. And to constitute a bar to the action of W. it must be by the same deed, which contains f. lease. Aliter, it is a covenant only. 1 Rot. 180. Com. Waste, E. 3.

If tenant in tail leases "without impeachment" &c. the clause does not bind his issue, tho the latter confirm the lease by accepting rent. 1 Rot. 180. Com. Waste, E. 3.

Tenant not guilty, if the injury is occasioned directly or indirectly, by the lessor - e.g. If he destroy a fence in consequence of which trees are destroyed. Com. Waste E. 4. 2 Rot. 822. C. 12 s. 11. Moor 4. So if lessor cuts f. timber, not leaving in for repairs. Moor 7 Com. Waste E. 4.

So, if the injury was occasioned by the act of God, or of public enemies - tho in this case he must repair in convenient time if the subject matter remain & he capable of repair. 2 Inst. 300. Cro. E. 55. 10 Co 137 Com. Waste E. 5.

Who may maintain an action of Waste.

The old C. E. writ of prohibition to restrain waste taken away by Stat. Westm. 2. 10 Stat. 100. 121. &c.

Waste being to the disherison of the party, the action must

Of Waste.

be lost by him who has the immediate reversion & in fee simple or tail. Co L. 50th. 285th. 30 Bl. 227. 5 Bac. 468. 2 Mol. 825. 644. 15. Holton 110. 2 Hot. 322. See waste C. 2.

The reversion or remainder in the p^{ty} must be immediate, i.e. there must be no intervening freehold reversion. If there is the reversioner in fee cannot maintain p^{ty} action for if he could the recovery w^d destroy the intermediate estate: (Doct.) 5 Bac. 468. 476. Co L. 54th. Com. waste C. 3. 5 Co. 77. 77. Lease to A for life, remainder to B. for life, remainder to C. in fee. Then if C. recover w^d A. during B's life, C's entry for p^{ty} for future w^d destroy B's remainder it being freehold. 2 H. 187. 1 Jones, 58. Moor 18. 2 Hot. 301. 2 Mol. 829. Crof. 688.

But if the intermediate remainder in B. (in p^{ty} last case) were for years only; C. might maintain p^{ty} action w^d A. during B's life, for B's remainder being a chattel interest does not require p^{ty} continuance of p^{ty} first particular estate to support it (2 H. 166.) but may take effect after C's entry on A's death. 2 Hot. 301. Com. waste C. 3.

If after p^{ty} commencement of the lease for life, p^{ty} reversioner grants the reversion for years to any other. This is not a remainder, & reversioner can have no action of waste during the second term. Co L. 54th. 5 Bac. 477. Com. waste C. 3.

2 p. 2.

If an intermediate remainder for life is limited on contingency, & the tenant commit waste before the contingency, the reversioner in fee may maintain the action, for since the recovery does not destroy p^{ty} remainder, but prevents it from vesting. 4 H. 82. Com. waste C. 2.

So if a Lease for life be made to A. remainder to A. for the life of B. the reversioner may have the action during

Of Waste.

during the first limitation. for both estates are in A.
2 Inst. 301. 2 Inst. 51. Cro. J. 588. Com. waste. C. 2.

Suppose if p. has the immediate inheritance at f. time
 of p. action but tho he had not at f. time of p. waste com-
 mitted, &c. Lease to A for life &c. remainder to B. for life - A
 commits waste. afterwards B. dies or surrenders - reversion
 or he may have p. action vs A. Co L. 54. 2 Mol. 829. 10. 25.
at Moor 387. 5 Co 70. All. 82. 10. 51. Com. waste. C. 2.

If tenant in common in fee or lease his part to his co-
 tenant for life or years, he may have p. action, & recover a
 moiety of the place & damages. Com. waste C. 2. Moor 71. La-
 by St. Wrist. 2. one tenant in common of p. inheritance may
 have this action vs his fellow, for waste committed in p. estate
 tho no lease at all.

The equity of the Stat. extends to joint tenants - not to co-
 parceners, for they might compel partition at Co L. 303. 22.
2 Ab. 183. 194. 2 Inst. 403. 4.

Who who has p. inheritance may join in the action
 one, who has a smaller interest. Ex. Husband & wife where
 the remainder is to them & the heirs of p. husband. So if the
 reversion is in A. & B. & p. heirs of B. - The wife may join
 in the first case - And p. record. 2 Mol. 825. C. 41. Co L. 53. 42.
Com. waste C. 2.

If lease for years commit waste & his term expires
 before action brought, yet lessor may have an action of waste
 for the damages (triple) - tho he cannot recover the place
 wasted. 51 Jac. 468. Co L. 285. 285. 2 Inst 306. 5 Co. 119. Cro J. 588.

Plff cannot maintain the action, unless he has the
 same estate continuing in him, which he had when p. waste
 was committed.

Waste.

was committed. Ex. (reversioner in fee after waste committed) grants the reversion to another, & then takes back. p. same estate. Action gone, for his right of action was divested by the grant - & re-purchasing does not revive it. 5 Bac 458. Co. L. 53. 356. 2 Mol. 825. The priority of estate is destroyed. Com. W. C. 2.

At C. L. grantee of a reversion in fee to C. not maintain this action - the non commission of waste being a condition, to which he is neither party nor privy. 2 Bl. 166. By Stat. 32. H. 8. he may (2 Bl. 158. Co. L. 215. Moor 874. Cro. J. 145.) after notice of grant given.

Against whom it lies.

At C. L. waste lay vs. Parson in Chivalry, tenant in dower, & tenant by C. only. 2 Bl. 282. 3. 2 Inst 145. 299. 300. 3 Bl. 224. 1308. 121. Com. Waste C. 4. 1.

As to tenant by Courtesy opinions contrary (5 Bac 469. Co. L. 54. Fr. N. D. 60.) but by the better opinion he was liable. But a lease for life or years was not. 2 Bl. 283. 5 Co. 13. 2 Inst 299. 5 Bac 469. Com. Waste C. 1. 4. Rev. Case C. L. 384. 2 Sw. 53. 2 New 90. as to Super. for life.

Tenant by C. only holds liable in Com. (Inst 244.

4. p. 2.

The reason of the diversity at C. L. between Parson & C. and Super for life &c. was, that the estate of a former being created by Law, & Law gave this remedy to them - but as the estate of the latter were created by a grant of a inheritance, he might have provided vs. waste. 2 Bl. 283. 5 Bac. 504.

But by Stat. of Edward Bridge (52. H. 3.) & Statute 5 Ed. 1. the action is extended to all tenants for life or years. 2 Bl. 283. 296. 225. 5 Bac. 500. 473. "Against him that holds by Law for a term of life or for a term of years. 5 Bac 469. 470. 3 Inst 30. Com. Waste 4.

Of Waste.

It lies therefore to devisees for life or years. 2 Rot. 326. l. 25. 5 Bac. 470. & since these Stats. Com. Waste C. 4.

So to the assignee of a lease for life &c. for waste done after assignment. Com. Waste C. 4. Co. L. 54^a. 6102. 683. 5 Bac. 473. pl. 37. 2 Inst. 302. The action in this case cannot be supported as the original tenant for life &c. 5 Bac. 473. pl. 37. Co. L. 54.

For it is a general rule that the action must be against him who commits (or thro negligence suffers) the waste. Com. Waste C. 4. Co. L. 54^a. Besides privity of estate is gone, as between lessor and lessee.

But if tenant in dower or by courtesy assigns, & assignee commits waste, action lies for & him & tenant in dower &c. For they were liable for waste at C. L. but as no action of waste lay at C. L. as an assignee, it lay of necessity as then even after they had assigned. 5 Bac. 472. 2 Inst. 300. Com. Waste C. 74. Co. L. 54^a. And their liability at C. L. is not now void by the Stats. Supra.

Indeed the heir in the last case cannot sue & assignee at C. L. for he is not tenant in dower &c. & requisite privity is wanting. 5 Bac. 472. 2. 2 Inst. 301. Com. Waste C. 4.

But if tenant by the courtesy &c. assigns, & assignee commits waste, & the heir grants away his reversion, & grantee of the reversion can sue the assignee in waste, & him only - for there is privity of estate between them. & tenant by courtesy &c. can hold, as such, of none but the heir. 5 Bac. 472. Co. L. 54^a. 316^a. 2 Inst. 301. 3 Co. 23^b. H. N. B. 56.

The action lies to an occupant, common or special. Co. L. 54^a. 2 Inst. 301. Com. Waste C. 4.

So to an Executor or Administrator who takes a term, as assigns. So

Waste.

As per Ex'or de son lat. Com Waste C. 4. 2 Inst 302. 2 Rot. 829.
3 Mod. 90.) - for waste committed by themselves.

If tenant for life &c. commit waste & then assign, he
remains liable. 2 Inst 302. 2 Rot 829. Com Waste C. 4.

If waste is committed by a Stranger, or Lands or prop^y
of tenant for life or years, the tenant is liable to an action.
So if tenant in dower or by curtesy - & the tenant has
trespass vs a Stranger. 5 Bac. 474. 2 Inst 145. 6. F. N. B. 60. 5 Com
Waste C. 4. Co L. 54. 2 Rot. 821. l. 5. - Tenant negligent -
wrong done being a Stranger cannot be guilty of waste,
& lessee &c. cannot sue in trespass, not having prop^y 5 Bac 166. 7.
3 Lev. 204. - But he may sue in case sent. 5 Bac. 166. 7.

Same rule tho the tenant be an infant or feme covert.
5 Bac. 474. Co L. 54. 2 Inst 303. Com Waste C. 4.

So, if a stranger disposes of lessee, & then commits waste.
Com Waste C. 4. 2 Rot. 821. l. 10. 5 Bac. 474.

4. p. 4. If tenant for life having committed waste dies, his Ex^{or}
or Adm^r is not liable to this action. So if tenant in dower
or by the curtesy, Com Waste C. 5. 2 Rot. 828. l. 34. 5 Com. 475. Munster.
off. Ex^{or}. 127. Brownl. 209. com.) it being a tort.

So if lessee for years, tho the term goes to the Ex^{or} &c.
2 Inst 302. Com Waste C. 5.

It lies not vs tenant in tail after possibility &c. for his
estate being, in its creation an inheritance, is not within s.
Stat. 2 Rot 125. 283. Co L. 27. 54. 2 Rot. 826. 8. 2 Inst. 302. (Injured
ante.) Com Waste C. 5.

Nor vs a lessee at will - for s. commission of waste is of ac.
is determined s. estate. 2 Rot. 146. (Besides he is not within s. Stat.
being neither tenant for life nor years. Com Waste C. 5. 5 Co L. 60. 2. 777. 784.

S. 1609

(T. Waste.)

Liab. to land prop. Co. 2. 777. 784.

Not a tenant for life &c. "without impeachment
t. & Co. 681 676. 2 Bl. 283. Moore. 327. 2 Mol. 835. perhaps
excepted by the stat..) not a tenant for years. Joh. 51.
Com. waste C. 5.

Of the Recov. in this action.

The punishment for waste at C. L. & by Stat. of Marlbridge
(32 H. 3.) was only single damages. 2 Bl. 283. 2 Inst. 146.

But now by Stat. of Gloucester (4 Ed. 1.) the tenant, for its be-
lie. damages & the place in which. 2 Bl. 283. 2 Inst. 303. 5 Bac.
487. Com. waste. F. 2.

Since this Stat. the action is in Eng. a mixed action really
& personally recovered. 3 Bl. 226. 117. 118.

If the Land demised be demesne, & waste is committed on one
only, - one only is recovered. 5 Bac. 487. 2 Bl. 284.

Only the particular parts, in which waste is committed,
are recovered; if they are easily separable from the other. In
a particular close - or one particular part of it. 5 Bac.
487. 2 Inst. 303. 2 Bl. 284. Thus, if committed sparsim, as in
a wood field &c. 2 Bl. supra.

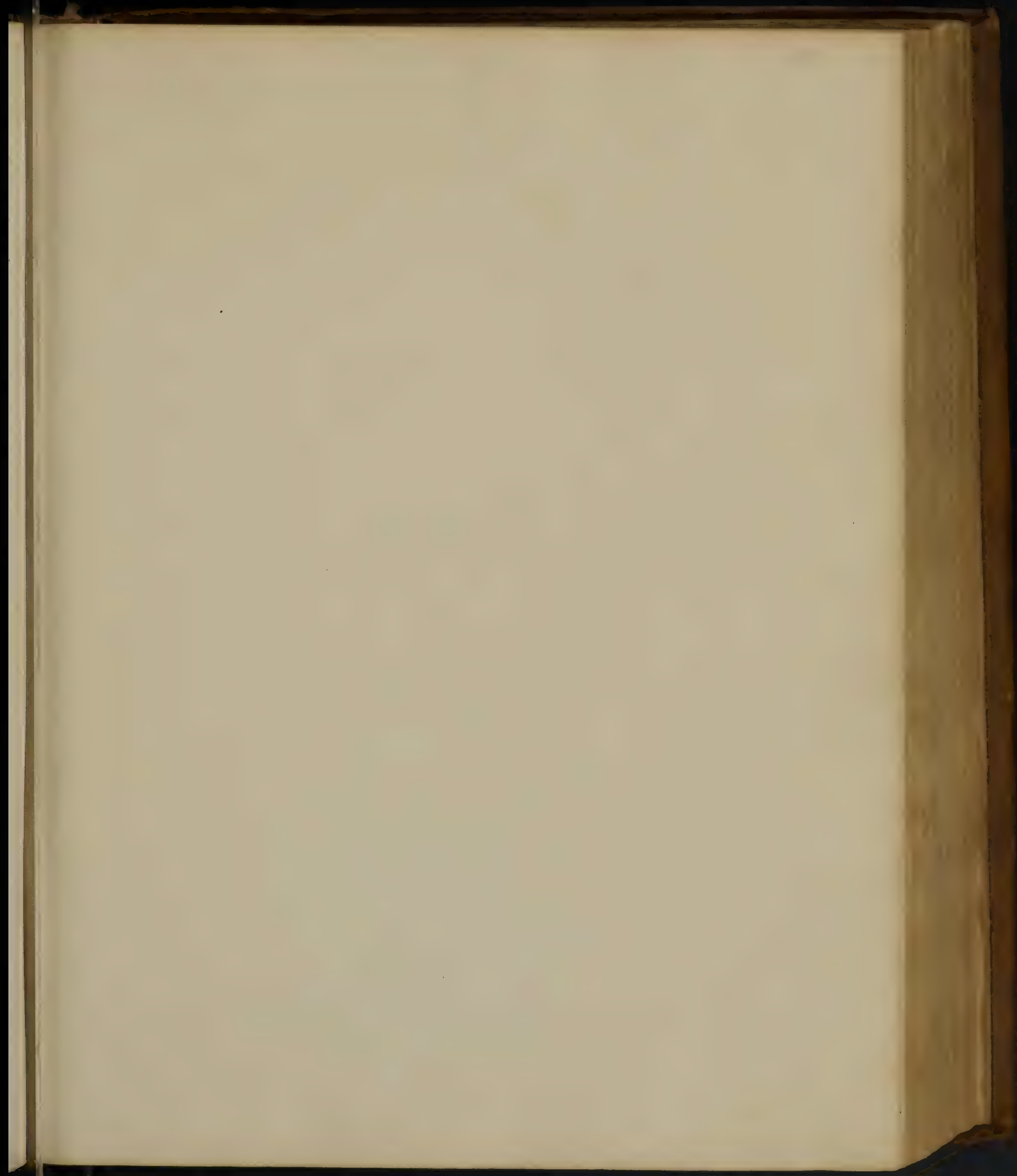
If committed in several rooms of a house, & whole re-
covered. Thus, perhaps if in one only, which is easily sep-
arable from the rest. 2 Bl. 284. 2 Inst. 304. Co. L. 54.

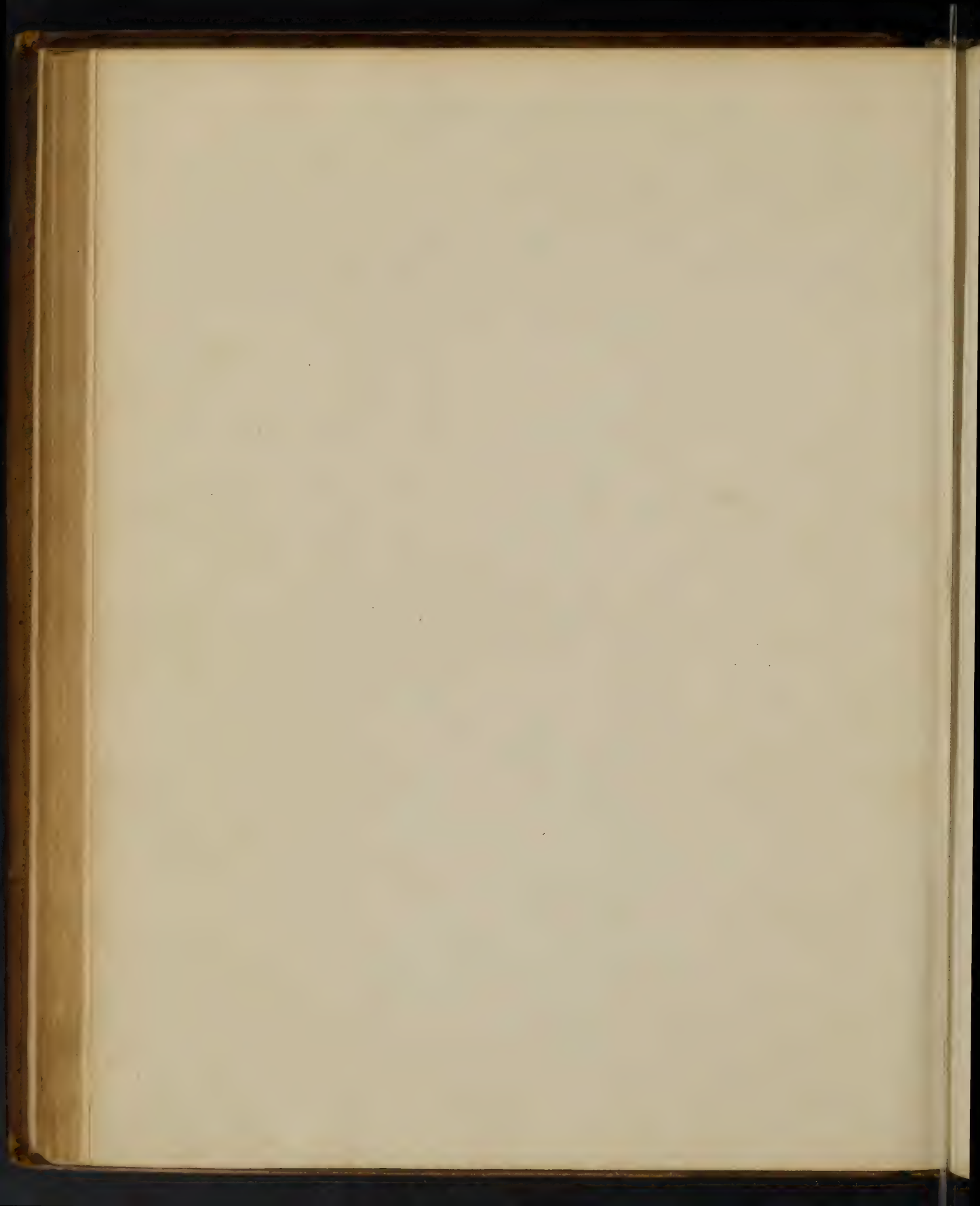
In Con. only single damages have been demanded - &
not the place waste. Qu. is not p. St. of Gloucester Law in Con?
House in C. of tenant in down of wife lands. ante. p. 4.

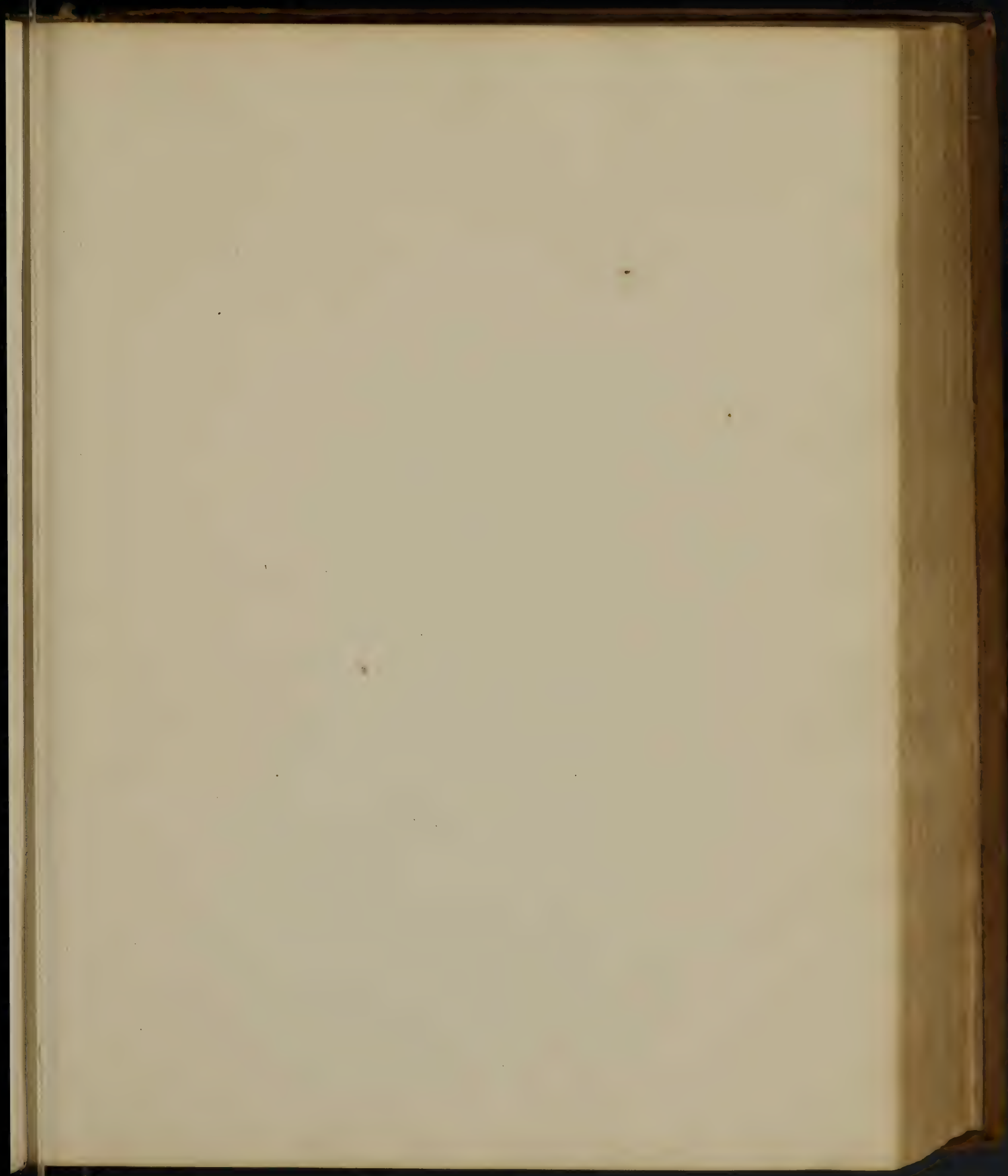
By Stat. of Con. if tenant in down suffers waste in
houses, buildings &c. or suffers fences to decay, the C. Ct. of
the County may on application by the heir deliver a writ
of waste.

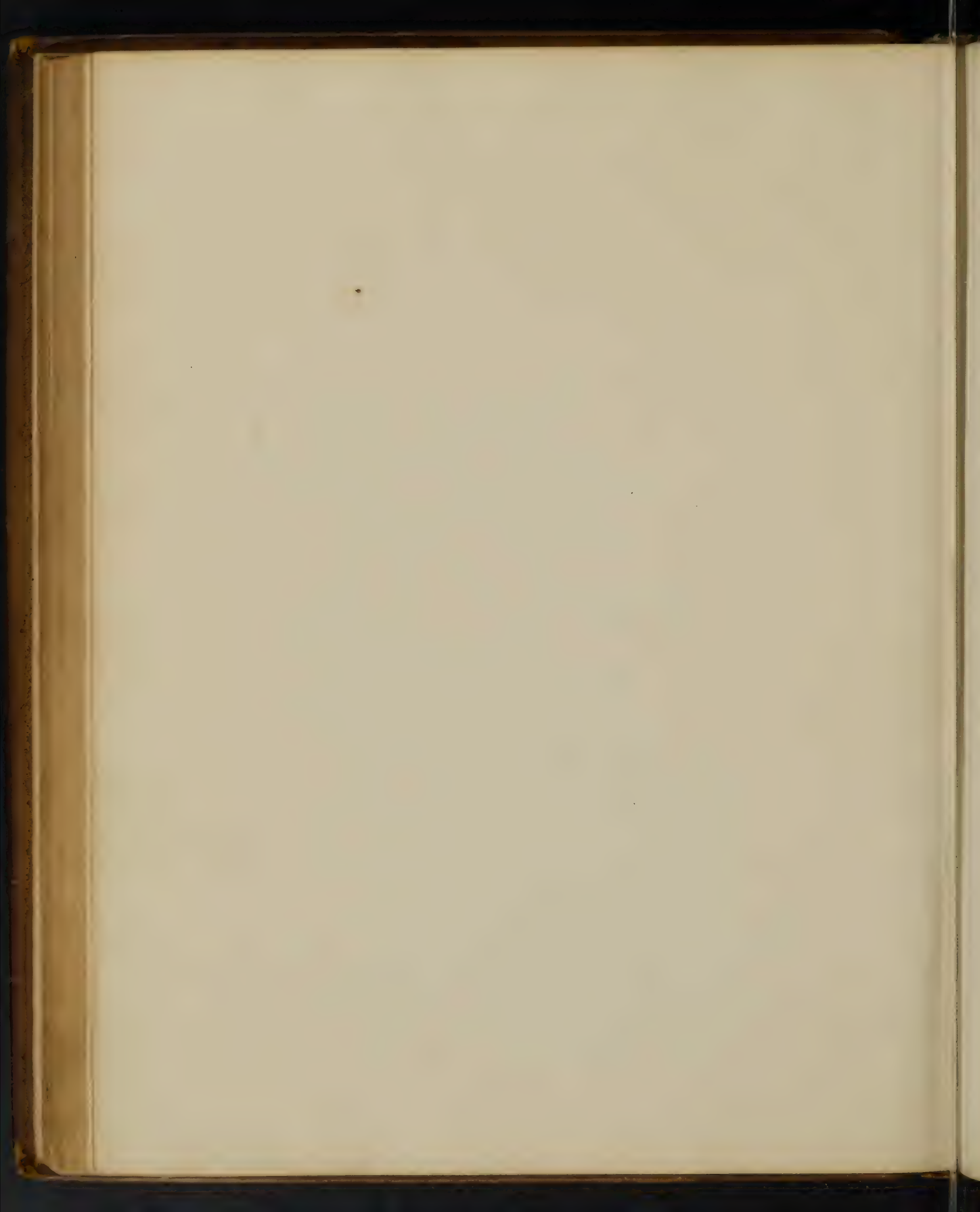
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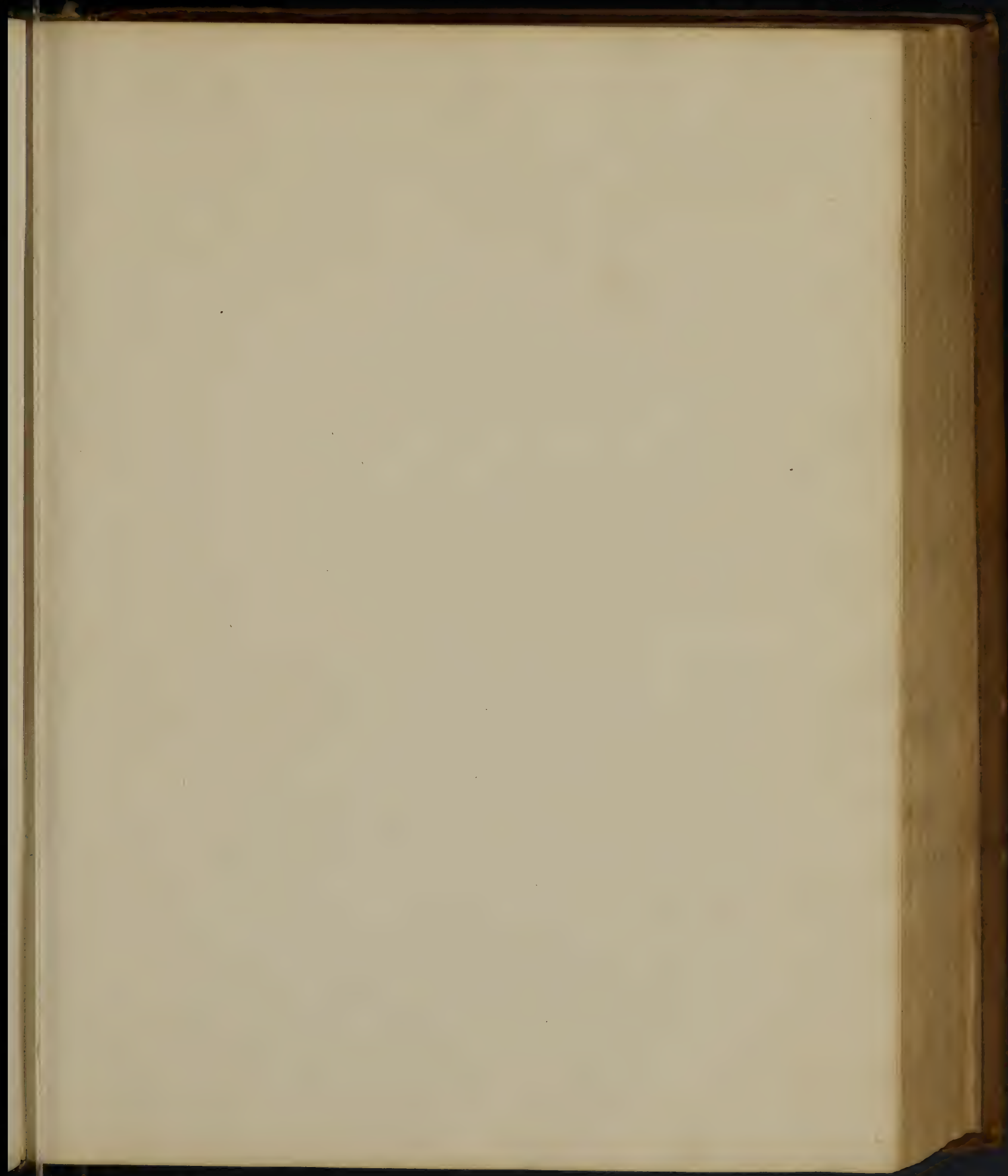
of the dower estate to him, & for so long a term, as may be sufficient in their judgment to enable him to make the necessary repairs out of the rents & profits - unless the tenant in dower will give good security for leaving the estate in sufficient repair.
Stat. C. 147. 1245.

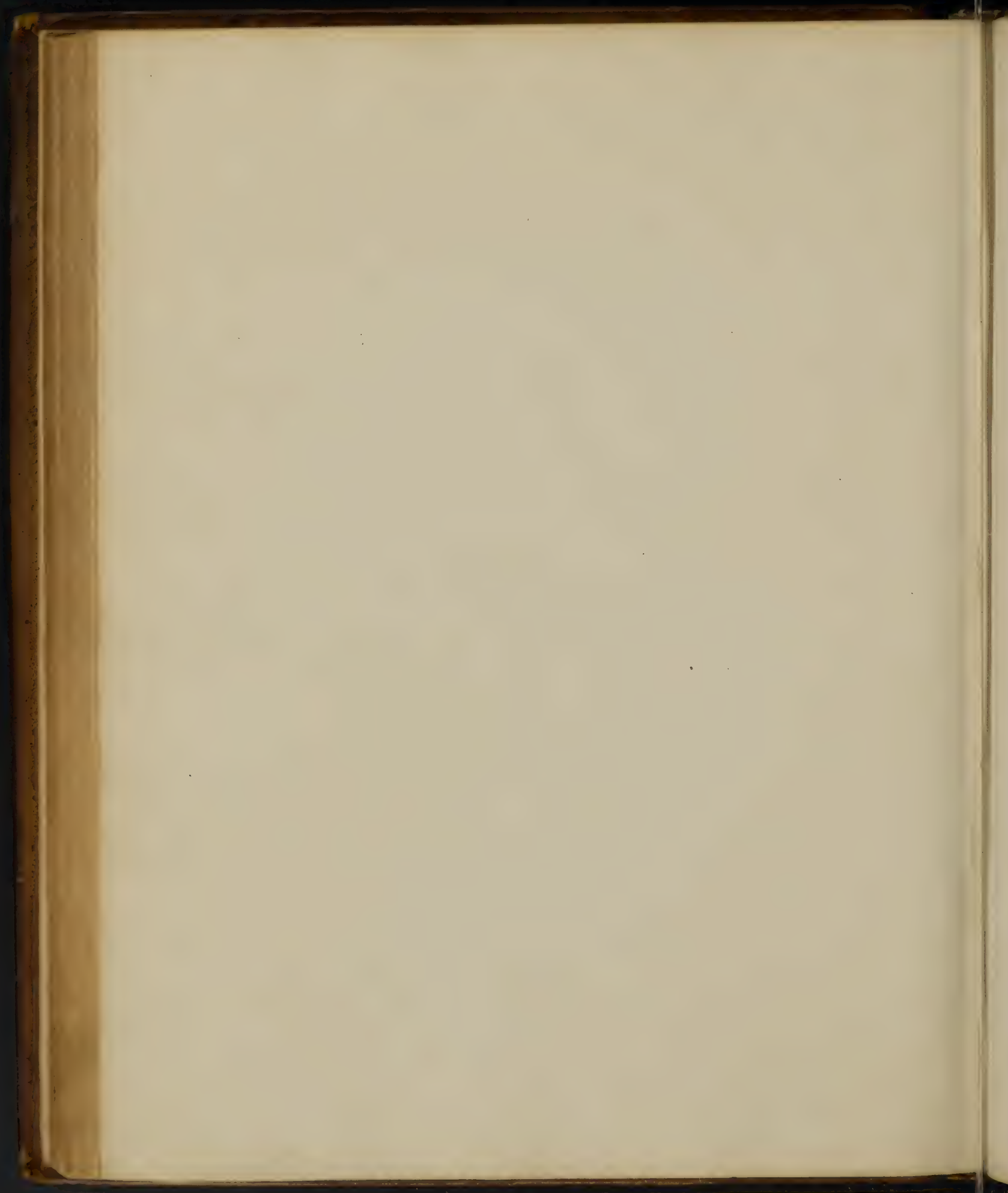


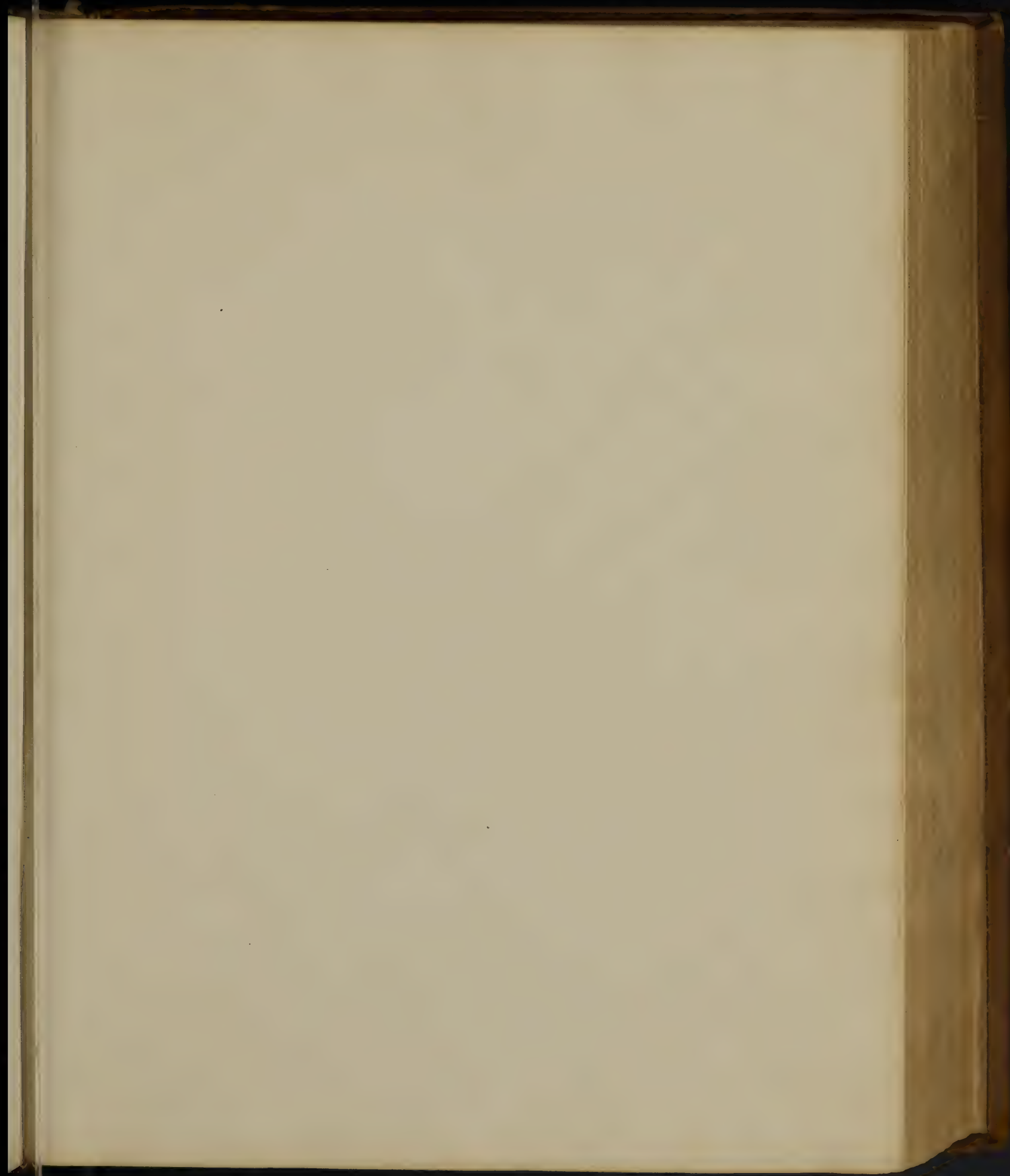


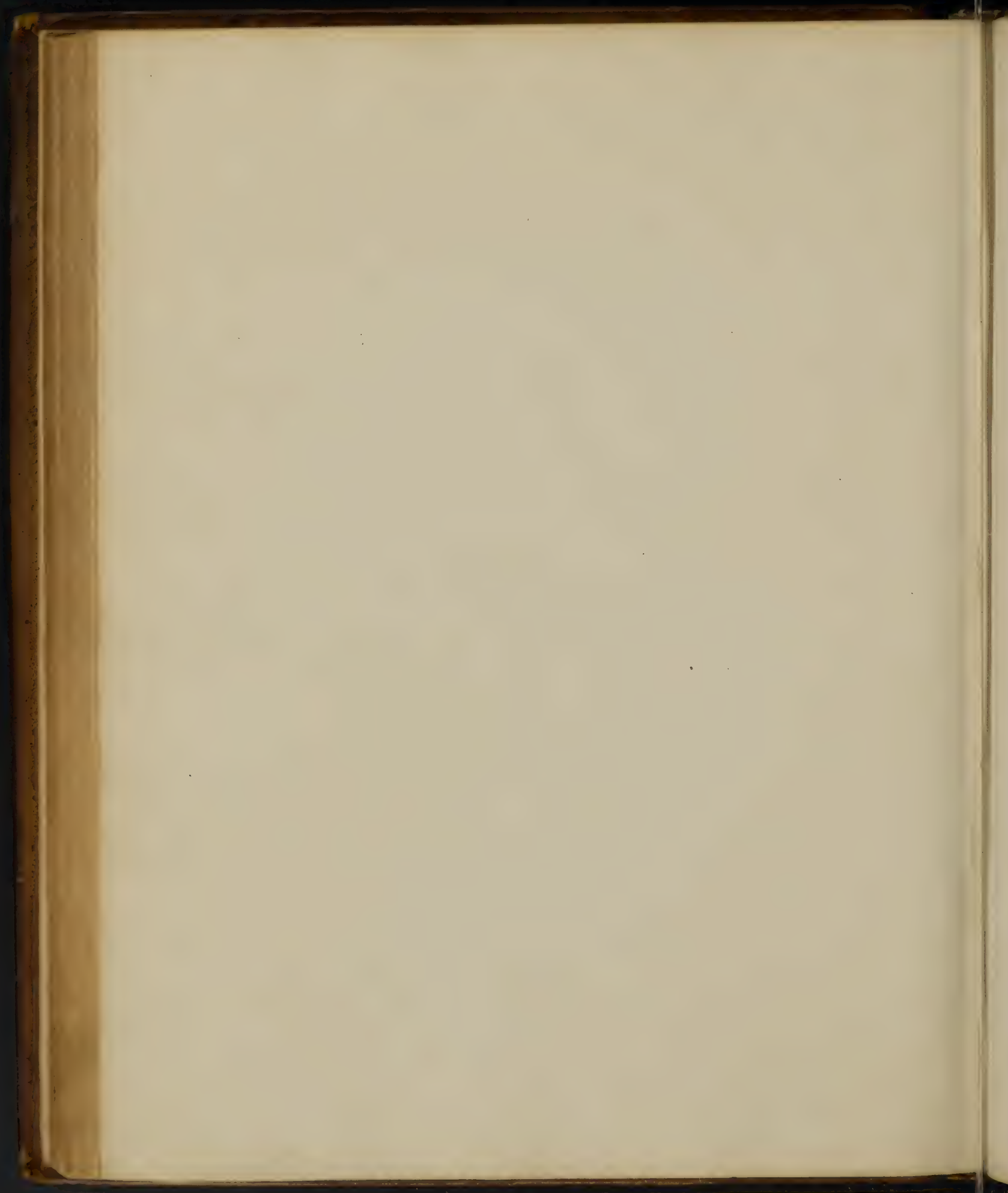


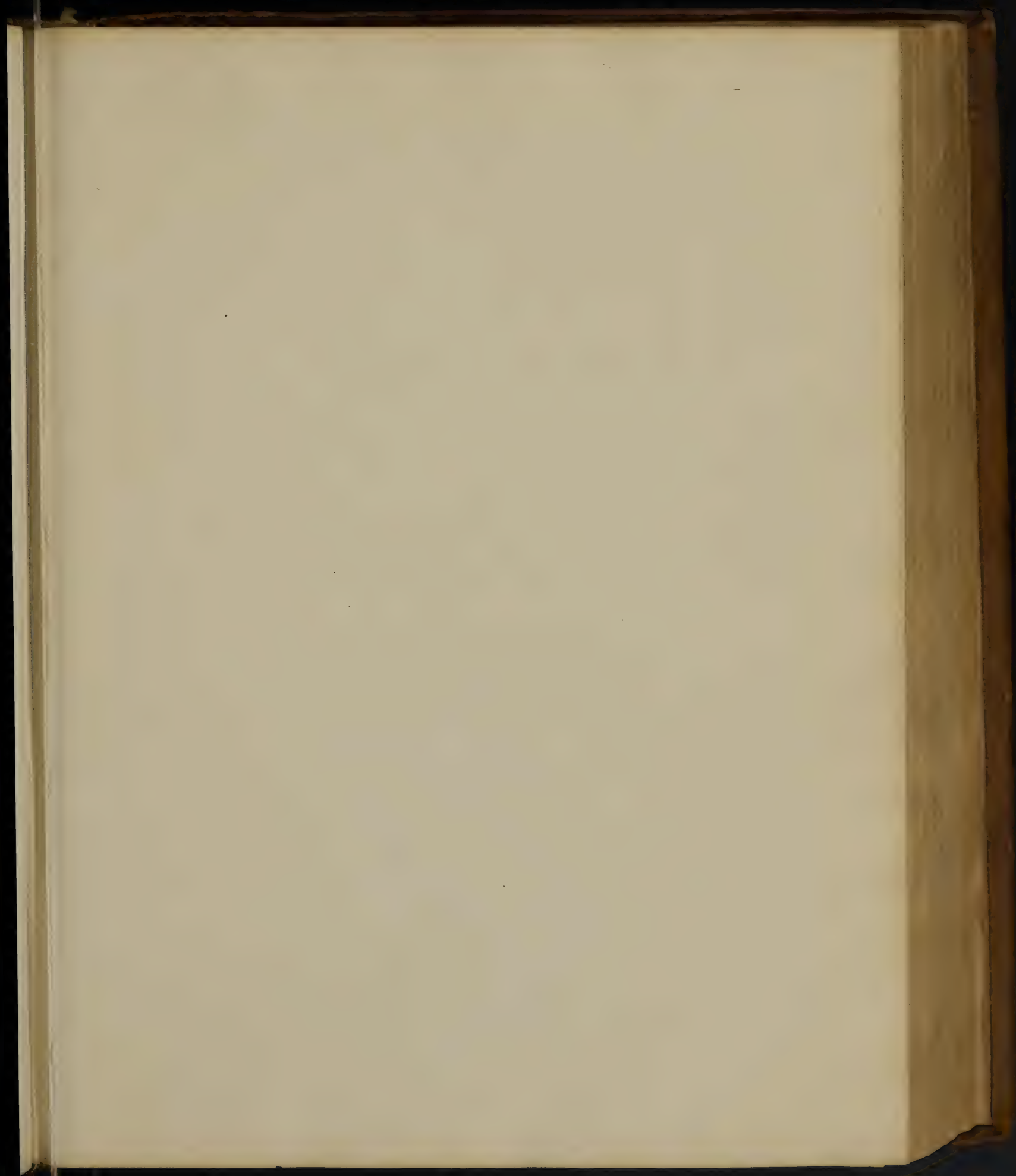


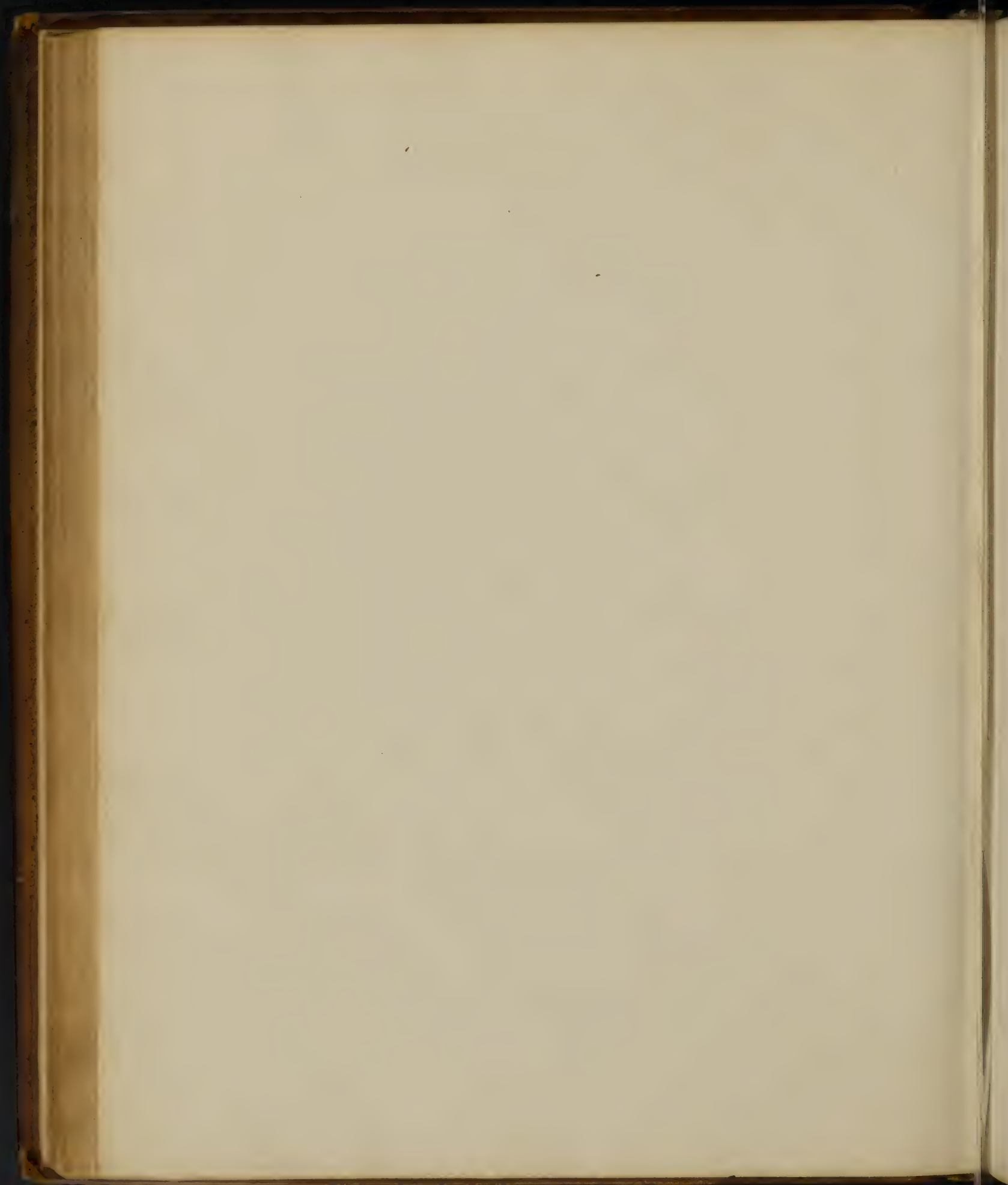


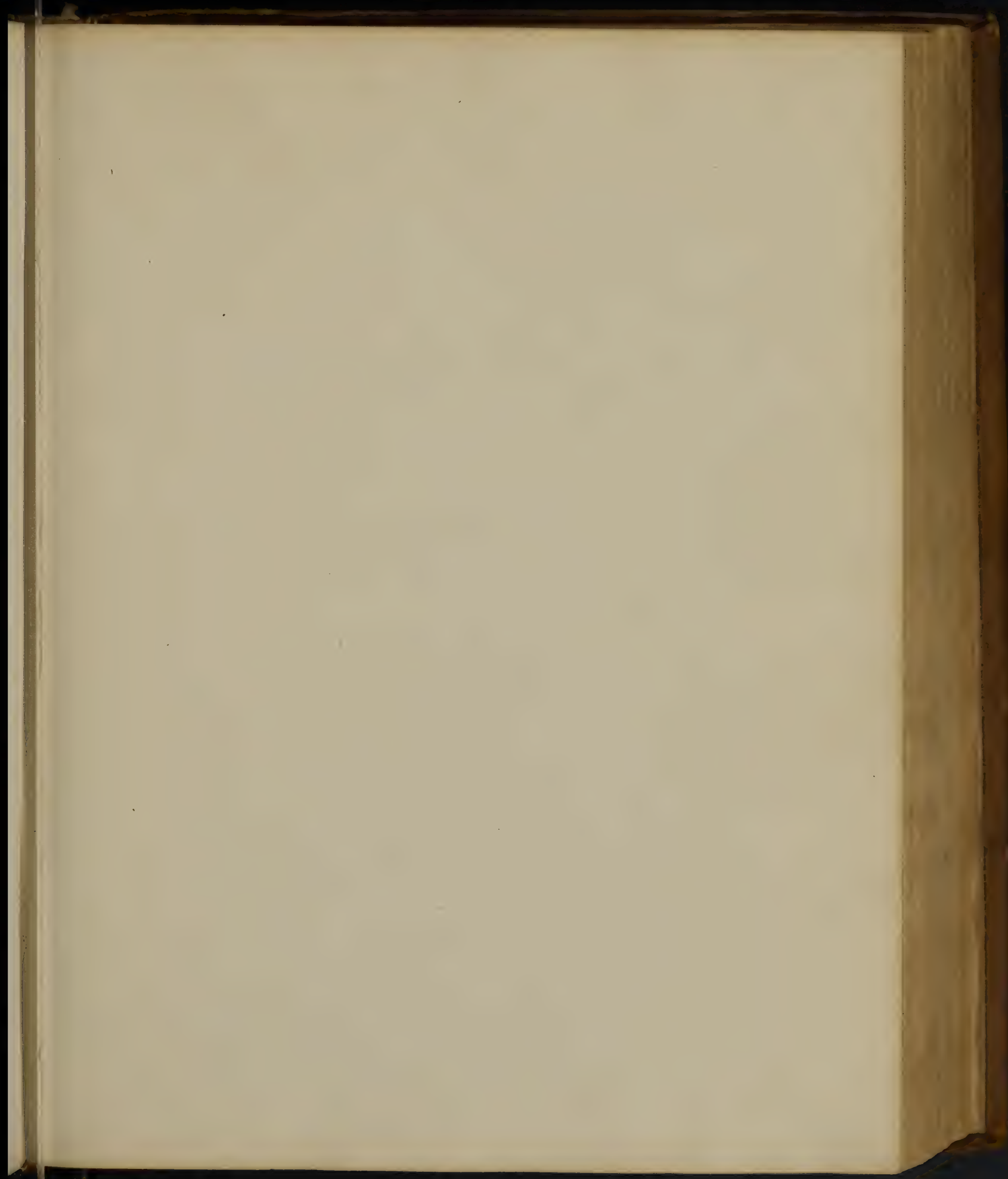


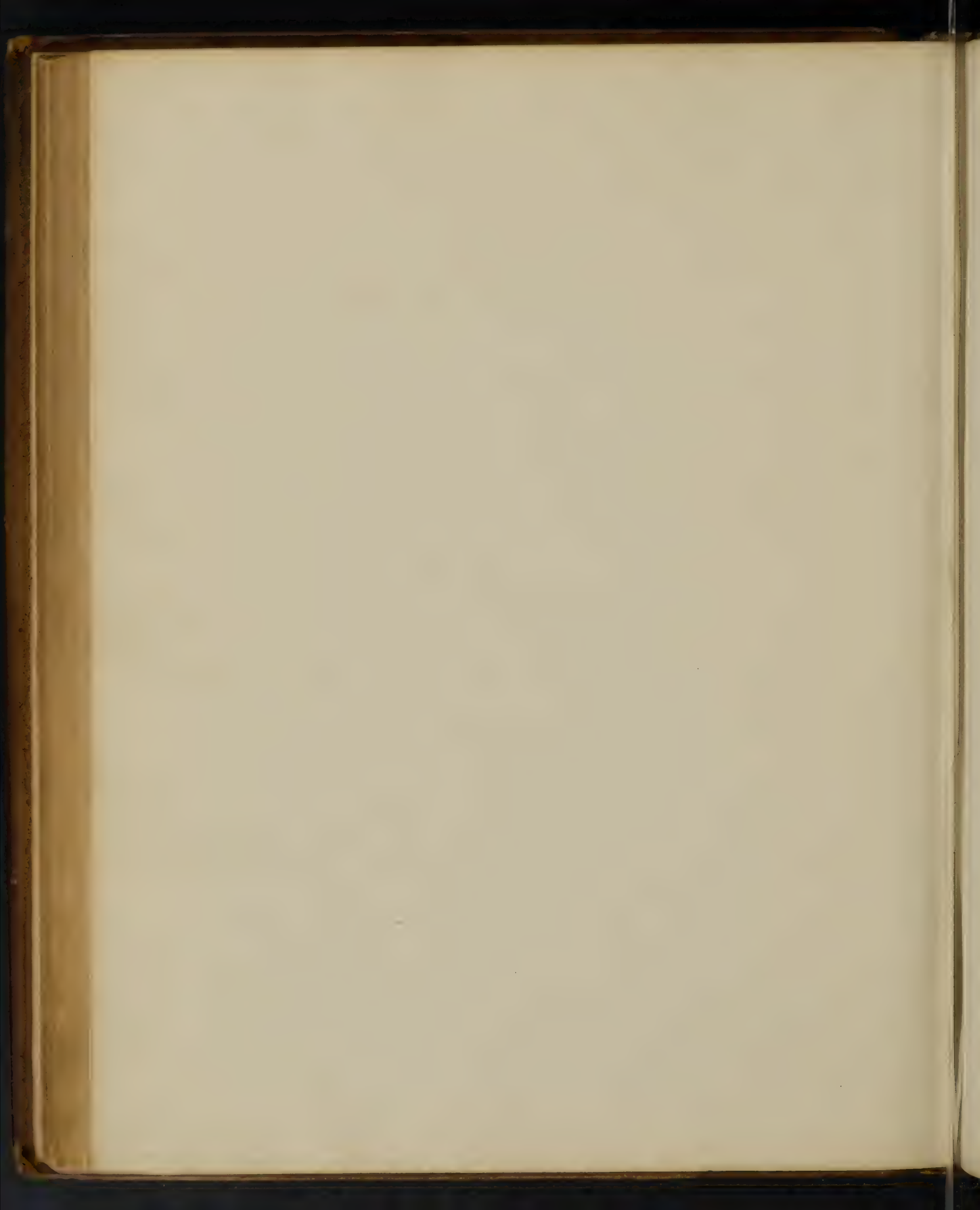


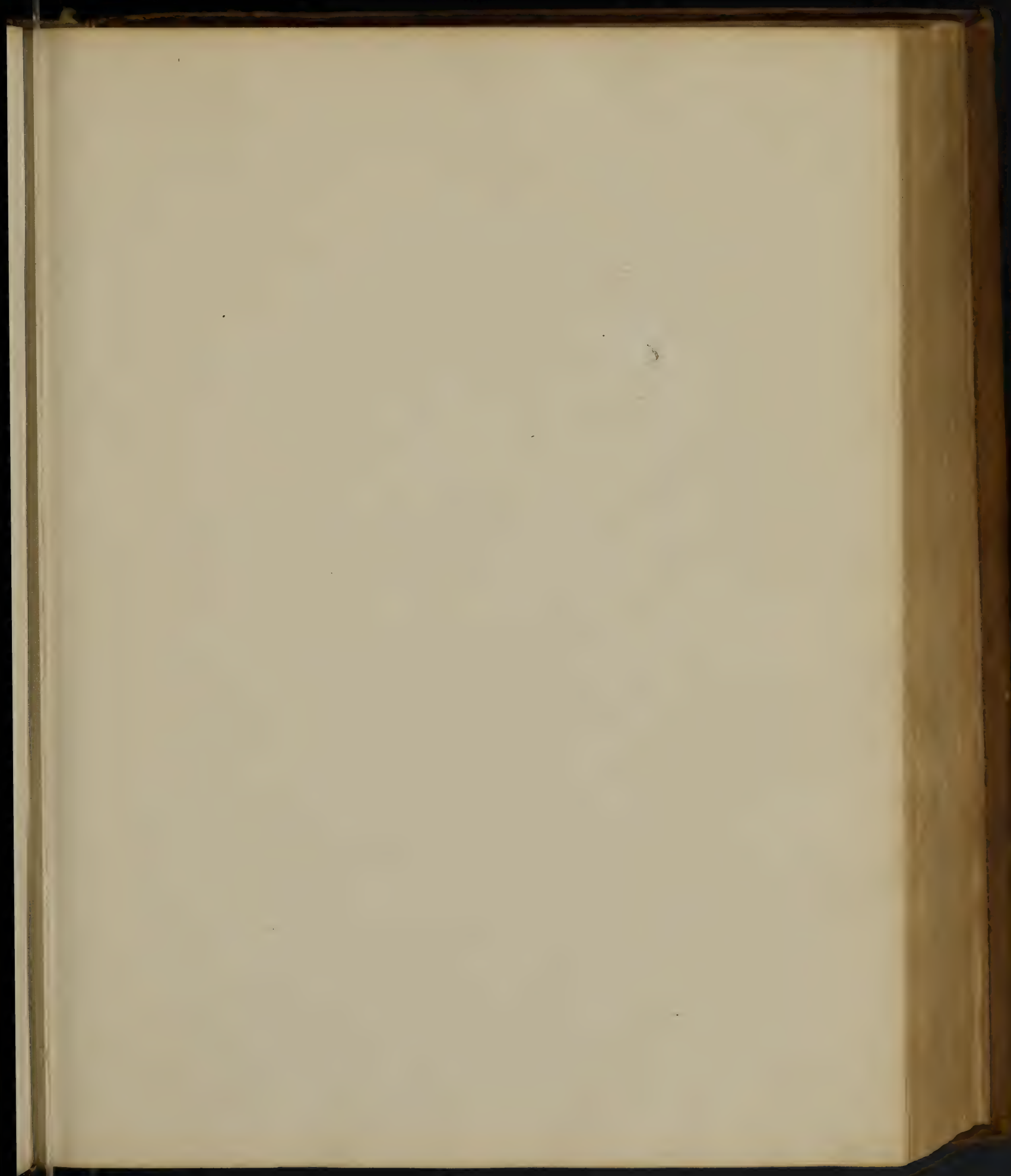


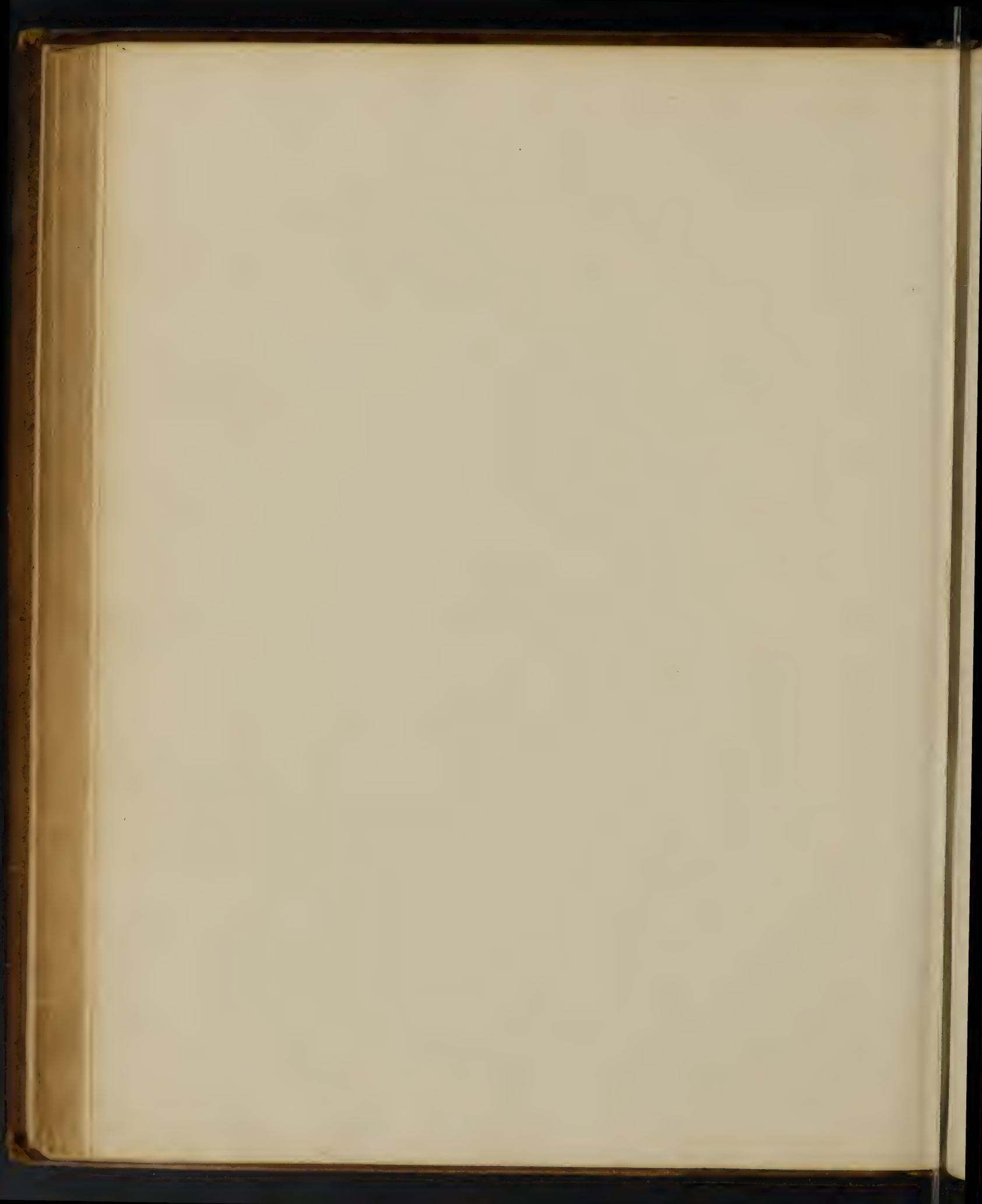


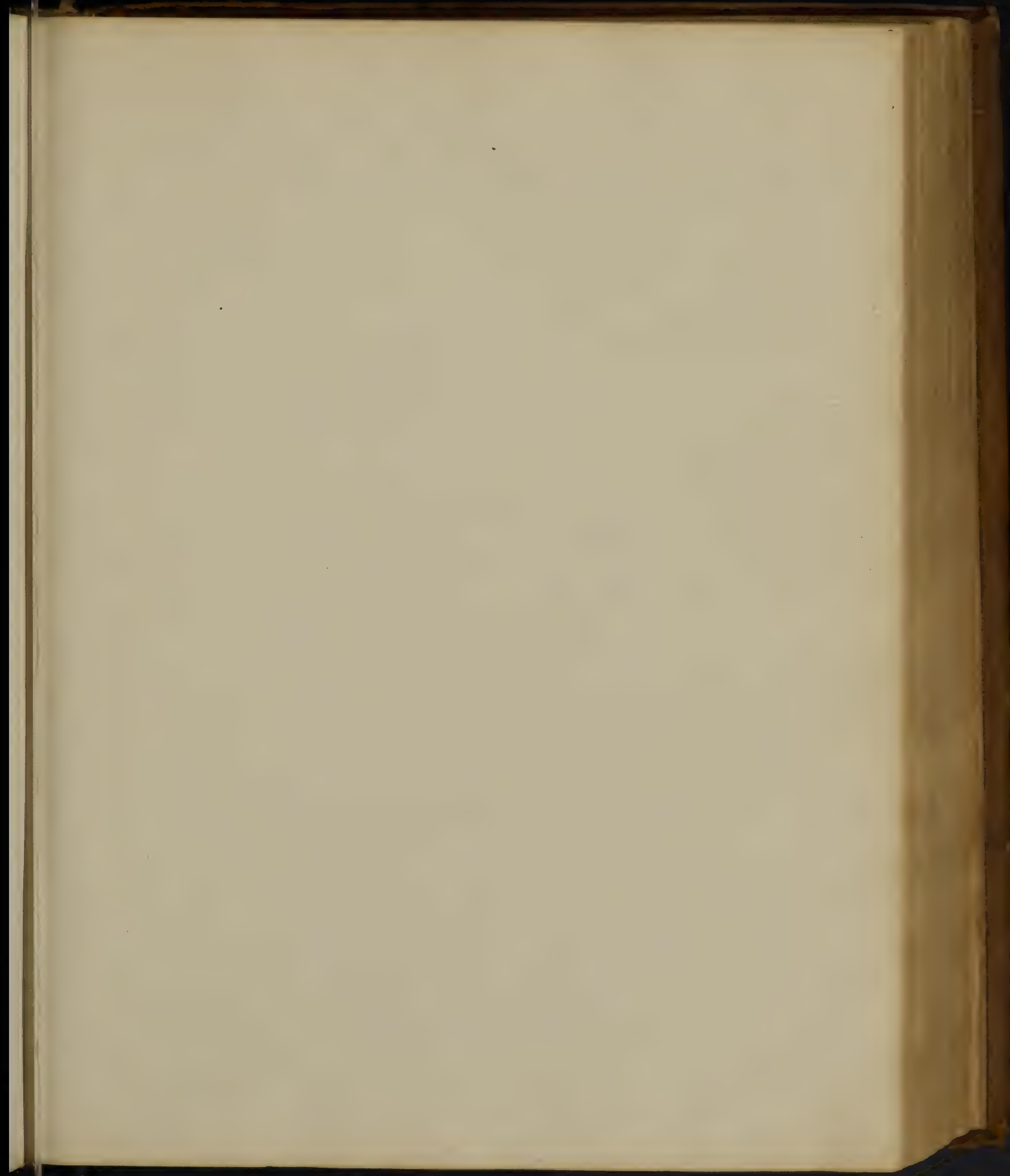


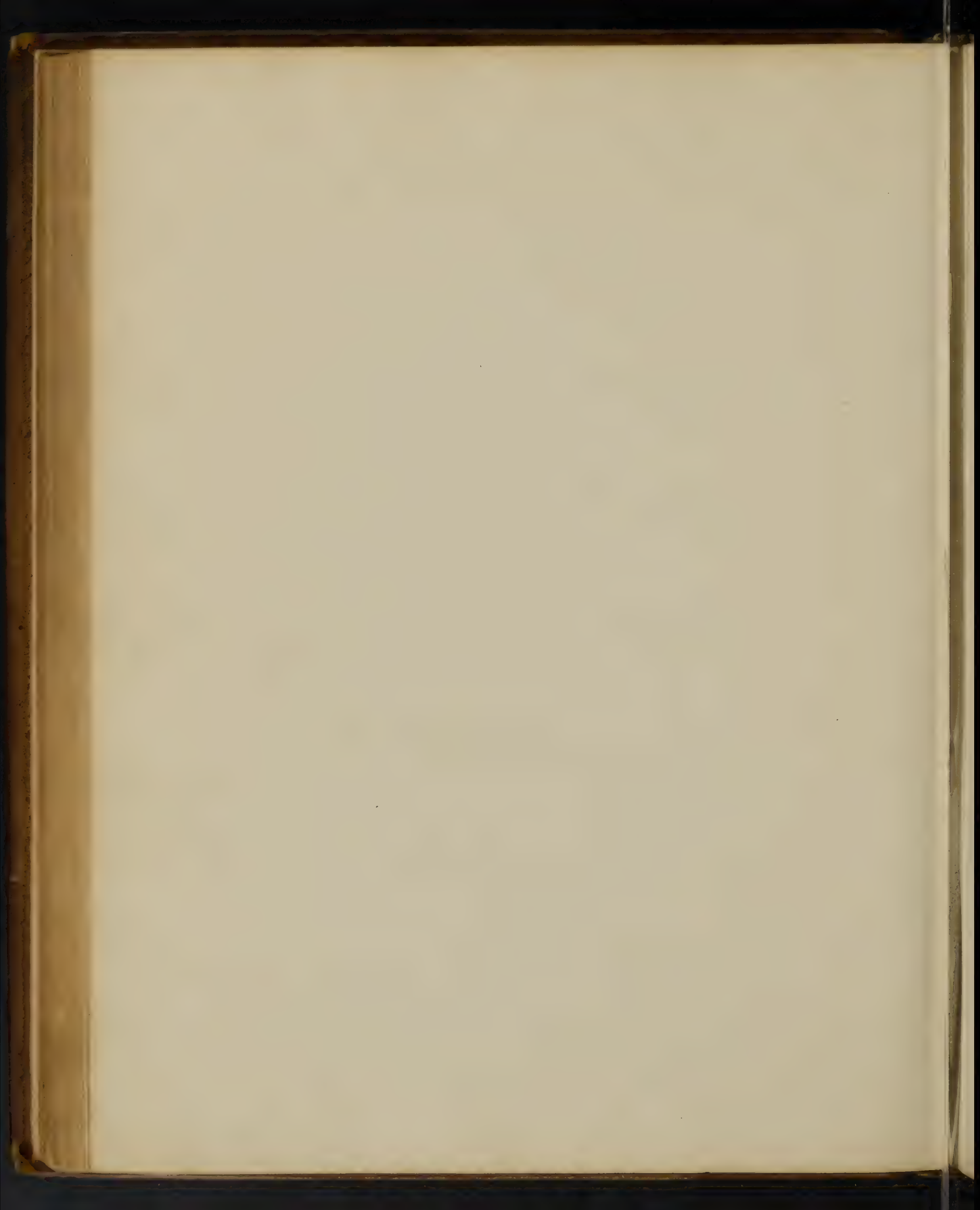


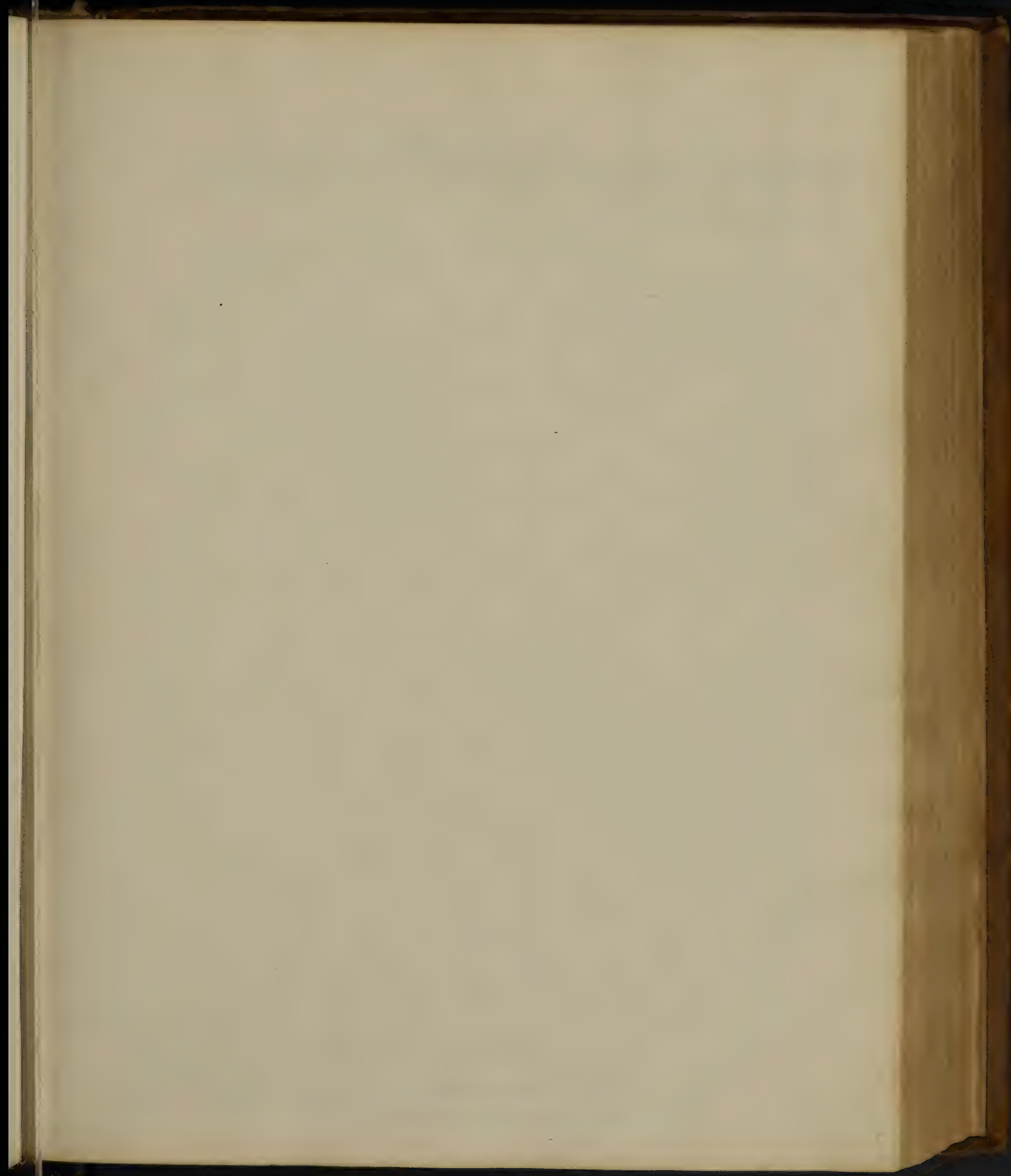


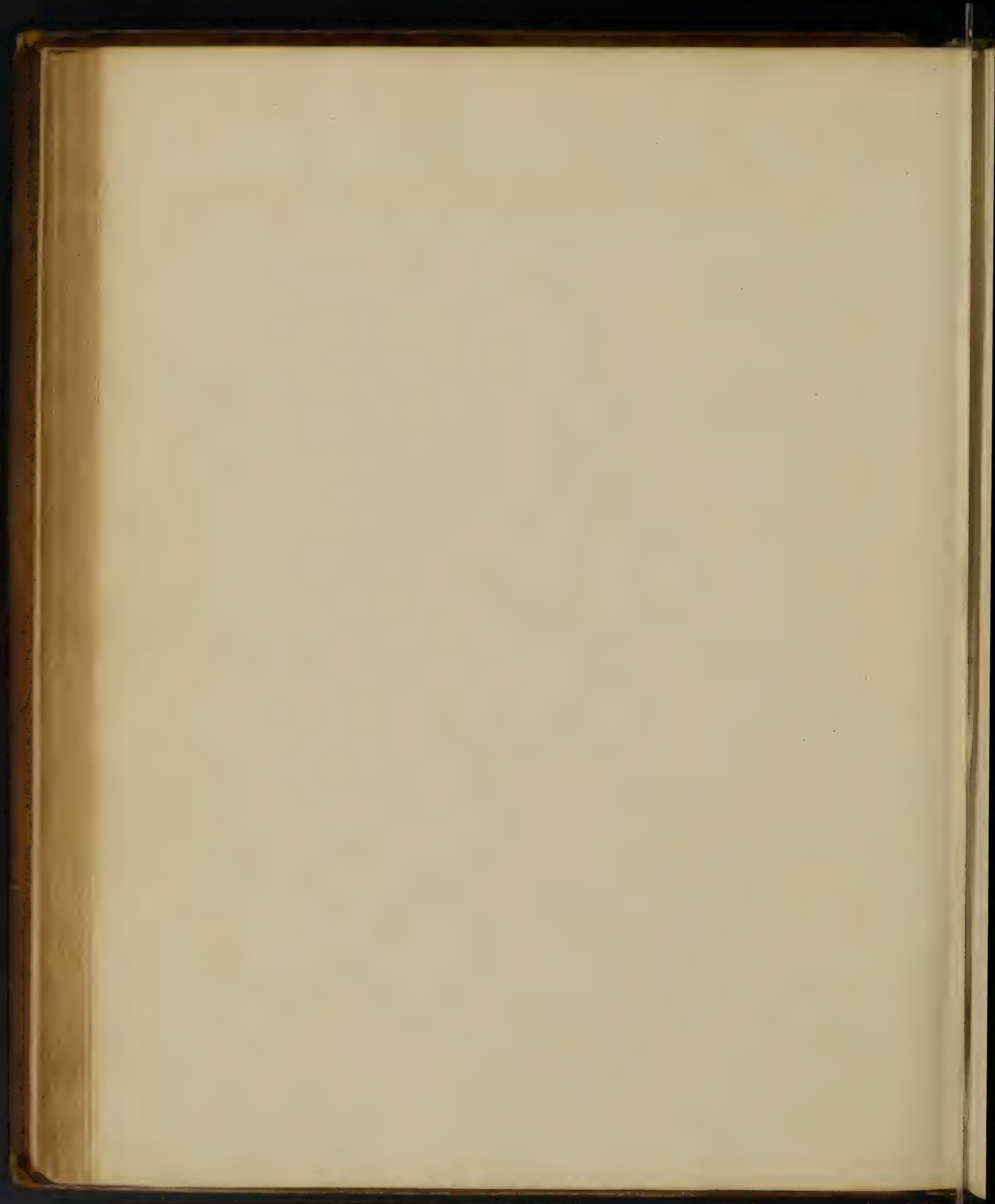












Lex Mercatoria. By Gould.

Sec. 1. March 8. 1813.

The Mercantile Law, or what is usually called the "Law Merchant", has been oftentimes denominated a "Particular Custom". But this is manifestly incorrect. A Particular Custom is one confined to particular local limits, one which does not extend thro' the realm; but the Law Merchant is not so confined. This is one reason why it is not a particular custom.

Another reason why the Law Merchant is not a particular Custom is, that the Law Merchant need never be specially pleaded, while a particular custom always must be. Again - except in new cases where the general usage is not ascertain'd, that usage can never be proved by witnesses, & yet all particular Customs are provable by witnesses, & I apprehend that where the Law Merchant is provable by witnesses (as in new cases at *supra*, it is not to instruct the jury, but to inform the Ct. as to the usage. And in this way it is doubtless as proper for the Judges to apply to experienced persons in Trade for a knowledge of their customs & usage, as it is to apply to literary men in literary questions.

Again. The Law Merchant is not to be tried by a jury, except in the single instance I have mentioned above. All these considerations go to show it is not a particular Custom. That it is, see 1. Bl. 75. Contra see 1. Salk 125. 2. Burr 1218. 1. Bl. 1298. 3. Burr 1669. 4. 5. K. 268. Doug. 72. 3. 653.

Lex Mercatoria

The Law Merchant was originally confined in its operation, in case of inland bills of exchange, to Merchants only. That is, in case of inland bills of exchange, no person other than a Merchant could avail himself of this system of Law. But it is now confined in its operation to any particular class of men. It governs particular transactions throughout the realm, but the whole community are included in its operation. 3 Bl. C. 436. 2 Ab. 454. 461. 462. S. Ray. 175. 2 Vent 295. 310. 2

It results then that the Mercantile Law is no other than a branch of the Common Law properly so called - it is not a particular custom any more than any rule of the C. L. as e.g. that rule which allows the obligee to bring Debt or Bond. It is not confined within local limits or to particular classes of community.

II. (I) Bills of Exchange & Promissory Notes.

A Bill of Exchange is an open letter of request addressed by one person to another, requesting him to pay a certain sum of money to a third person, or to any other to whom that 3^d person shall direct, or to the Bearer who is himself the holder, at a given time. 2 Bl. C. 466. ¹ Hix. or B. 3.

Bills of Exchange were invented for the purpose of facilitating distant remittances by creating a credit in one country & thereby extinguishing a debt in another. As if A in America owes a debt to

Lex Mercatoria.

to B. in London, & C. in London owes A. Now A. by drawing a bill in favor of B. on C. his Debtor, & extinguishes the debt due from him (A.) to B. & C. by accepting & paying the Bill, extinguishes the debt due from him (C.) to A. By so doing the risk & trouble attending a remittance of the debt due from C. to A. & also from A. to B. is wholly prevented. For a form of a Bill of Exchange see *Kid B. 17. Chitty B. 37 & onw.*

It follows then that a Bill of Exchange may be drawn payable to "A or his order" or which is the same thing, "to the order of A.". Or it may be drawn payable to "A or bearer", or "to the bearer" generally, without naming any payee. And if the bill has the necessary qualities, it is a good bill if drawn in either of the above different ways. 1 *Wils 190. 3 Bur 1517. 1527. 2 B.C.C. 467. Chitty B. 47. 107. 8.*

The person who makes or issues the Bill is called the Drawer; the person on whom it is drawn is called, before his acceptance, the Drawee, after acceptance the Acceptor; the person to whom it is made payable is called the Payee, & if he orders it paid to another, this other is called the Indorsee; & anyone who has possession of the Bill, is called for the time being the Holder. Thus the payee or the indorsee while the bill is in their possession is called the holder. *Kid B. 4. 2 B.C.C. 467. 176. B.C. 586.*

Indeed a Bill of Exchange is, substantially, nothing more nor less than an assignment to the Payee of a debt due from the Drawee to the Drawer.

Lex Mercatoria. Bills of Exch. & Promy Notes.

that is, a supposed debt, for it is not always the case that a debt is actually due from the drawee to the drawer, but it is so in contemplation of Law. Thus where A draws a Bill of Exchange on B payable to C. This is an assignment to C by A of the debt due him from B. 1 H. 132. 602. Chitty B. 13.

A Bill of Exchange properly so called differs from a common draft or order by being negotiable, & this is all the specific difference. Instruments called drafts or orders are very common in the country, yet they are not Bills of Exchange. The reason is they do not contain operative words of transfer, that is, they are not negotiable.

Now it becomes a very important subject in all commercial countries to ascertain what instruments are, & what are not negotiable. There are certain instruments which may be assigned or transferred, as e.g. a bond &c. yet this does not make them negotiable instruments.

A negotiable instrument is one, in which the Legal as well as the Equitable interest may be assigned to a 3^d person, or one who was not originally a party to the instrument; & this is what distinguishes it from other instruments. The Equitable interest on a Bond, Covenant &c. may be assigned, yet the Legal interest cannot, therefore such instruments are not negotiable.

The negotiability of an instrument then, is that quality in it, which renders it assignable.

Lex Mercatoria.

(Bill of Ex. & Prom. y. Notes)

Law. It then becomes important to ascertain in what consists the difference in effect, between the assignment of the Legal & Equitable interest. In many cases the difference is in toto, & in others very important.

The person who has the Legal interest in the assignment of an instrument can sue upon it, in his own name. The assignor has no control over it; he cannot discharge it, & has in fact no more concern with it, than any other stranger. But if the assignee has only the Equitable interest, he cannot sue upon it in his own name; the assignor may control it & discharge the instrument precisely as if he had never parted with it. The assignee in this latter case, takes the instrument, subject to such incumbrances.

If then A draws a Bill of Exchange on B in favor of C. and the bill is signed to D. he (D) may have his action on the Bill either as the payee, or Drawer or acceptor - & furthermore he (D) is the only person who can sue upon it, for the Legal & Equitable interest are both in him by the assignment. C. 7 T.R. 243. 3 B. 182. 4 B. 342. 5 B. 683. 17 B. 602. Chit. 1.

This negotiability of instruments is opposite to the rule of the C. L. in relation to choses in action generally. For the rule of the C. L. is that they cannot be assigned, because it promotes litigation. It is transferring a right to a Law suit. The meaning of the C. L. rule is, that the legal interest in the

Tex. Mercatoria

(Bills of Exch. & Promy. Notes.)

debt, raised or secured in the instrument, cannot be transferred. Hence, so far as the rule prevails the assignee of a chose in action cannot maintain an action in his own name. E.g. a Bond made payable to A. is by him assigned to B. Now B cannot maintain an action on the bond in his own name, it must be brought in the names of the original obligees; for the legal interest in a Bond cannot be assigned, as a bond is not a negotiable instrument.

The rule is the same as to all promissory notes, unless they are drawn payable to order or bearer; to all covenants; to all promises; and indeed the rule of the C. S. holds as to all other than mercantile contracts properly so called. 1 Inst. 265th note 1. 232. note 1. 232. 442. 1 W. 4211. Little. 5. 6. 108.

A consequence of the C. S. rule that choses in action can't be assigned is, that the obligee of the instrument, or party, originally claiming, may release the debt at law as well after, as before assignment. 7. D. R. 663.

The general rule inviolated in Cons. with respect to Promissory Notes, payable to bearer or order, until very lately. But now by Stat. all Promissory Notes payable to order or bearer amounting to 55£ (or upwards) are put upon the same footing with inland Bills of Exchange & Promissory Notes in Eng. & many of the States.

But the rule of the C. S. was so strict in prohibiting the transfer of choses in action, that the

Lex Mercatoria.

(Bills of Exchange & Promissory Notes.)

Purchasing of a chose in action was held to amount to maintenance, & punishable as a crime at C.D. This rule has long since been relaxed, & is now wholly abolished.

But now the purchasing of an instrument which is not negotiable, is no offence at C.D. & Courts of Equity will protect the assignment of choses in action tho not negotiable, if the assignment was for a valuable consideration. So if a bond is made by A, payable to B and B assigns it to C, and A has notice of the assignment. Now if A pays the bond to B, a Court of Equity will compel him to pay it over again to C, because they allow the assignment of such choses in action. The equitable interest is assigned tho the legal interest can not be. 1 Mac 157. 2 BC 442. 2 Vern 428. 540. 595. 692. — 3rd Apr 1792. 1 Ves 411. 412.

In Conn. the choses in action are not assignable, yet our Cts. have determined that where a chose in action has been assigned, & the original debtor has taken a discharge of the instrument from the creditor (or the obligee) after he has had notice of the assignment, that the assignee may have an action on the case vs the original debtor, for the fraud in accepting the discharge provided the original creditor (or obligee) is insolvent; & I apprehend says Mr Gould the rule would be the same if he was not insolvent.

And in Eng. as in Conn. the contract of assignment,

De Mercatoria.

(Bills of Exchange & Prom. N. 10.)

is now good at Law as between the parties to it. As e.g. if the obligee of a bond assigns it to another, it is good at Law as between the assignee & assignor, tho' the assignment does not transfer the legal interest in the debt, so that the assignee can maintain an action on the debt in his own name. This then is a demolition of the C.D. rule, that is, it is a demolition so far as the above case differs from it. It is true the old C.D. principles upon the general subject, remains inflexible.

A mere assignment of a chose in action amounts to an implied Covenant of the transfer of the beneficial interest in the debt, & that the assignee may use the name of the obligor or assignor to collect the same. The Contract of assignment per se implies this Covenant. And if the obligor (assignor) releases the debt, or receives the money due on the same, an action of Covenant Broken lies vs him, & this is the usual remedy in Eng. 2 Bl. 442. Balth 125. 1 Bos C. 317. 2 Wray 682. 1242. 3 Helle 304.

I will here observe, that a chose in action may be assigned by Parol, tho' it is usually done by writing, as by indorsement on the back &c. But it is not required to be in writing by C.D. for the C.D. did not allow of it - neither is it required by any Stat. to be done in writing, therefore it may be done by Parol. 4 T. R. 690. The same remedy, viz Covenant broken, might doubtless be applied on Con. tho' it is usual here to bring an action on the Case for fraud. Yet Cov. broken will lie.

Lex Mercatoria.

(Bills of Exchange & Promy. & Notes.)

Indeed as the Law now stands the equitable interest of an assignee in a chose in action is for several purposes recognized in a Ct. of Law. Thus it has been determined, that an assignment of a chose in action not negotiable, as e.g. a Bond, is a sufficient consideration even at Law to support a promise by the assignee. Thus if the assignee of a Bond assign it to a 3^d person, & he the 3^d person, in consideration of it promises to pay a sum of money to the assignor, it binds him in Law. 1 Roll 29. 1 Sid 212. 2 Bl. R. 320. Chitty 5th.

Again - It has been determined that the assignor of a Bond having become Bankrupt may still maintain an action upon it in his own name for the use of the assignee - or in other words, the assignee may sue & maintain an action in the name of the Bankrupt, & still a Bankrupt cannot maintain an action in his own right. Bankruptcy is always a good plea to a person's disability, yet in the above case, the equitable interest appearing in the assignee the Ct. will allow the action in the name of the Bankrupt. This is another instance where the equitable interest in a chose in action is recognized in a Ct. of Law. 1 T. R. 619.

And it has been determined in an action on a Bond given to B. in trust for A. a debt due from A to B. may be set off. Thus if I give you a Bond in common form, in trust for B. & you sue me on the Bond, I may plead a debt due me from

Sec. Mercatoria.

Bills of Exch. (From p. 411.)

3. as a set off, tho he does not appear on the record. This has goes one step farther than any other rule, & from some cases I find I should be inclined to question the correctness of it. For the rule see 1 T.R. 621. 4 W. 430. Esp. de 222. The auth. Qu. See 7 T.R. 663. Kid 108. Earth 5. 2. Cent. 209.

I would here observe in closing my observations on this particular subject, that the negotiability of Foreign Bills of Exchange was recognised for the first time in the 14th Century, & that of Inland Bills of Exchange in the 17th Century. Chitty 7.

Thus far as to the C.L. rule that choses in action are not negotiable, I now proceed to treat of the General Subject -

I have to observe, that generally in all actions on simple contracts the Plff must prove a sufficient consideration, tho as to actions on special contracts, as Duds &c, it is otherwise. 1 Pow C. 330. Jones? 7 T.R. 351. Kid 47.

But in actions on Bills of Exchange, tho these are not Duds, it is in general not necessary for plff to show he gave a consideration for the Bill. In actions on these Bills a consideration is implied as in case of Duds, tho they are not Duds. In this respect a Bill of Exchange has one of the main qualities of a Dud, which is that it contains internal evidence of a consideration, & this is the distinguishing point in the difference between simple & special contracts. 1 W. 43. 1 B. 445. 2 S. Ray. 258. 1 B. 437. 3 L. 470. Chit. p. 51. 115. 116. 185.

Lex Mercatoria.

(Bills of Exchange & Promy. Notes.)

The foregoing rules apply equally to negotiable notes as to Bills of Exchange. & the rules hereafter to be laid down apply to both, altho I may not be careful enough to mention both in treating of the subject!

But to the general rule last laid down viz. that a Bill of Exchange contains internal evidence of a consideration, there is an exception where the holder claims as bearer of the bill transferable by delivery, & under suspicious circumstances. As if the Bill was lost by the Payee, & another person brings an action upon the bill, he may be required to prove that he or some intermediate person between him & the loser paid a valuable consideration for it. For if the plff. is finder, he will never be allowed to recover, tho if the plff. paid a valuable consideration for the bill, even to the finder himself, he shall recover, because the subsequent holder of a negotiable instrument is not to be affected by the want of title in some former holder. The Example is found in the plainest reason. It appears that another originally owned the instrument & lost it, & it is probable the Plff. found it, or stole it. At any rate, it has gone out of the hands of the original holder without consideration, & this may be inquired of. But if the Plff. had bought the bill of the finder, or any other person, it w^d be otherwise. Here the Credit is not to be impaired in the hands of a bona fide holder. 3 Burr 1516. 1523. 2 Show 235 Chitty, 451. 201. 9.

Sec. Mercatoria.

(Bills of Exchange & Promissory Notes.)

But this exception can not hold as to the originator of the Bill, because he appears on the instrument itself to be the very party claiming under it. The rule is the same as to the indorsee of a bill, i.e. the exception cannot hold where the bill is indorsed to the D^r. If B. is the holder of a bill, he is not to prove a consideration, tho' it might prove that he lost it; for by the indorsement of it it appears B's title is good. All suspicion is removed. You have now been presented with the general rule, & the exception to it, viz. in what cases the holder of a bill is obliged to prove a consideration.

On the other hand the D^r is in general not permitted to prove that he received no consideration for the Bill, except when the action is between the persons who are immediately concerned in the negotiation. As if the action is brought by the acceptor or the drawer, or by the indorsee, or the indorser in these cases the D^r may prove the want of consideration, for the parties on the suit are privies to the contract; and by allowing the D^r to question the consideration, there is no danger that thereby the credit of the bill will be injured, or the rights of any 3^d person at all affected. Again suppose the drawer sues the acceptor - now he can question the consideration for by doing it the credit of the bill is not impaired, nor the rights of any stranger infringed, & the parties on the suit are immediately concerned in the

Lex Mercatoria.

(Bills of Exchange & Promiss. Notes.)

negotiation of the bills, but if the action was brought by an indorsee, as the acceptor, the consideration can not be questioned, for if it could it would injure a third person who trusted to the mercantile credit of the bills. Chilly 54. 1 Rob. W. 445. 1 Esp. R. 117 to 119. 1 Stas. 674. 1 Eids. 76. 7.

It would seem questionable from a case lately determined in the State of New York whether the want of consideration may be averred when the action is brought by the parties to the negotiation. 2 Gaines 246. Evans Ch. 18 32. N. Y. R. 71.

The case in Gaines perhaps renders that questionable which I had no idea but was fully established. Our New Books have always laid down the rule as settled, but the Ct in New York say there is no judicial authority for the doctrine. How far this decision shakes the old rule & long received opinion upon the subject I am unable to tell.

March 9. 1815. Lecture 2nd.

I concluded my yesterday's lecture with laying down the rule that the life was in general not permitted to aver the want of consideration except when the action was between persons immediately concerned in the negotiation. But to this rule there is an exception. If when a person receives a Bill by transfer or indorsement, after it is payable any person who is sued upon it may show the want of consideration by way of defence, & he may insist upon any other reputable defence of which the holder was aware at the time of

Lex Mercatoria.

(Bills of Exchange & Promy. Notes.)

the transfer. The reason is that there is ground of suspicion that the holder knew of the want of consideration or other equitable defence, as above. Hence when a holder who has received a Bill after it has become payable, commences an action upon it as a prior party it is left to the jury, upon the slightest circumstances to presume the fact of want of consideration, or fraud in the transfer of the Bill. 3 T.R. 82. 7 T.R. 423. 11 T.R. 293. 4. Chilly. 52-113.

Hence where a Bill has been transferred after it has been noted for non payment, this will be sufficient evidence for the jury to presume that the holder knew at the time the facts which rendered the transfer unfair. And if it can in any way be proved that the holder at the time of ^{receiving} the Bill knew it was dishonoured, the rule is the same whether the Bill is noted or not. 3 T.R. 82-3. 7 T.R. 423.

Indeed it has been said that a holder who receives a Bill after it is payable, is liable at once to all the equity, to which the Bill was liable in the hands of the original party, & this independent of any notice. This opinion is advanced by Justice Buller & some others, but I am inclined to doubt its correctness. A later case implies a contradiction. According to this opinion there is no need of leaving it to the jury to presume want of consideration &c. at suit for according to Buller's opinion he is liable of course to all the original party & has been. 7 T.R. 423. 3 T.R. 82. 11 T.R. 293. 1206, 230. 2. Den. 2. 170. Chilly 114.

Lex Mercatoria.

(Bills of Exch^t & Promy. Notes.)

Bills of Exchange are divided into 2 kinds viz. Foreign and Inland. Foreign Bills of Exchange are those which are drawn in one Country or Sovereign State, & payable in another. Inland Bills of Exchange are those which are payable in the Country where they are drawn. This is the characteristic distinction, there is no difference in their structure. Kier 10.

Bankers checks, or drafts on Bankers are in form like Bills of Exchange. In one respect they differ however in form from some Bills, for they are never payable to order but always drawn payable to Bearer, & of course negotiable by manual delivery. 7 T. C. 423. Chitty 16-17-109-171.

These instruments, now Bankers checks, drafts on Bankers, & Bankers Cash Notes are negotiable like Bills of Exchange. Formerly they were not. The rule as above is now well settled. 3 Burr 1517.

These instruments are not payable until demanded, & in this case they differ from Bills of Exchange which are not usually payable on demand, but on a particular day, or so many days after sight. Chitty 16-44-45. 7 T. C. 423.

These instruments may be & usually are declared upon as Bills of Exchange; tho it is said they cannot be protested, i.e. a protest will answer no purpose. Same with above 3 Burr 1517-1519.

They are also treated as Cash, for they have become in Eng^d a circulating medium. This is not the case in Conn. for private banks are here

Sec. Mercatoria.

(Bills of Exch. & Prom. Notes.)

prohibita. But in Eng. & in many of the States they are
received & in these places such instruments consti-
tute a great portion of the circulating medium. They
are for this reason denominated bank, & will pass
in a bill exchange. 2 Bl. R. 1. 12. 144. 145. 146. 147. 148.

If these Bankers Notes &c. are not drawn and in
a reasonable time, & the Banker fails, the holder
must bear the loss. This is reasonable for it is in
his power to demand payment of the bill immedi-
ately therefore if he neglects for an unreasonable
length of time, he shall not be permitted to resort
for indemnity to the person of whom he originally
received the bill. The Law does not point out a par-
ticular time when the demand shall be made, it
must therefore be within a reasonable time...

1 Bl. R. 1. 12. 144. 145. 146. 147. 148.

And I would here make an observation which
will frequently apply during the title, viz. that
what is a reasonable time, which was formerly
considered a question of fact, determined by juries
is now a mere question of Law determined by the
Court. There is some ambiguity in the Books ow-
ing to a want of perspicuity in laying down
the rule. There was a great diversity in the de-
cisions of Juries upon what was & what was
not a reasonable time, & thereby a great incon-
sistency in the Law merchant was rendered uncertain
& unsettled. For this reason the Ct. took upon them-
selves the liberty to determine what was a reasonable

time. I observed there was an ambiguity in the Books upon this rule owing to a want of perspicuity in expression in laying it down. It is true, the facts being given, whether it is a reasonable time or not is a Question of Law to be determined by the Court.

What is a reasonable time is in the abstract a matter of Law for the Ct. to determine; but when in any particular instance, a dispute, as to the time being unreasonable, arises, it is, in the first instance, a mixed Question; & if the facts are not settled by the parties, the jury must determine them; but these facts being determined, it then becomes a Question of Law, whether reasonable or not.

Thus - Suppose the holder of a Bank check delays to present it for payment for a month, & the Question is, is this a reasonable time? Now there must occur in limine a number of Questions of fact - as how far do the parties live asunder? for it makes a vast difference in the idea of neglect whether the parties live 500 miles apart, or in the same neighborhood. The next Question of fact is, what is the conveyance? Is it by Mail or otherwise? if by mail how often does go to & from the different places of abode of the parties; & what is the length of time employed in the journey. These are all Questions of fact which are important to be ascertained. But suppose these Questions of fact are all agreed upon or concided by the parties, it then becomes a mere Question of Law, for the

Lex. Mercatoria Bills of Exch. & Promissory Notes.

Court to decide. But if they are not conceded by the parties the Question is a mixed one, & the Court direct the Jury if they find the facts to be so & so to find for the plaintiff, or it is different for the Defendant as the case may be. 1 H. 4. 1. 42. 1 Bl. R. 1. 18. 415. 550. 2 H. 910. 1243. 1175. 2005 Lex. Merc. 482.

I have been thus far considering the general nature of Bills of Exchange. I come now to treat of the necessary requisites or component parts of a Bill of Exchange. Of the Parties.

And here I would again observe that, that formerly it was holden that no other than a merchant or one engaged in mercantile transactions could be parties to a Bill of Exchange. But it has long been settled that any person having ability & under no legal incapacity to contract may be parties to a Bill. The Law Merchant regulates particular transactions, but is not confined in its operation to any particular class of Persons. Chitty 19. Carth 282. 2 Vent 292. Comb 152. 12 How 125. 1 Falk 125.

And not only natural persons capable of contracting, but also Corporations may be parties to a Bill of Exchange. A Corporation must become a party to a Bill by the act of its agent or attorney. They may authorize a person to act for & in the name of the Corporation whose act will be binding upon them. But they cannot sign, endorse, or in any way become parties

Lex Mercatoria. Bills of Exch. & Promiss. Notes.

to a Bill in their aggregate capacity - it must be done by procuration. 1 Ast. 181. 5 Burr. 12. 16.

And I would further observe that if a bill is drawn, accepted or endorsed by a person who is legally incapable to bind himself yet it will still be good as to all others who were parties & capable of binding themselves. Thus suppose a Bill is drawn by an infant & endorsed by an adult - the adult would be bound the the infant is not. So if a Court of Law draws a Bill, & a person legally capable endorses it he is bound. 2 Ast. 181. 182. Chitty 21.

The original parties to a Bill, are generally three, tho by subsequent negotiation the parties may become indefinite. The original parties to a Bill are the Drawer, the Drawee, and the Payee. Their characters have before been explained. (Kide) very incorrectly, observes that there are 4 original parties to a Bill. In Legal theory, there are three parties, but there need not be three persons actually engaged in the creation of the Bill. One person may act in two capacities. Chitty 22. Kid v. 3.

It is not necessary however that there should be 3 persons originally concerned to make a Bill, tho in the theory of the Law there are 3 persons concerned - but one person may act in two capacities - as e.g. one may draw a Bill on another, payable to his own order. Thus one person has the right & capacities of Drawer & Payee. In this

Lex Mercatoria. Bills of Ex. Ch. Prom. Notes.

case there are but 2 persons concerned yet one acts in a double capacity. - And as one may draw a bill on another payable to his own order, so he may draw a Bill upon himself payable to a 3^d person, or to the order of a 3^d person. In both these cases one acts in 2 capacities. 1 Salt. 130. 6 Mod. 29. Kidg. Chitty 48.

And there may be a valid bill with but one actual party in the case. Thus a man may draw a Bill upon himself payable to his own order - & it is a good bill. It is true the bill is entirely inoperative while it remains in his own hands, but if he negotiates the Bill he is liable in the capacity of Drawer, acceptor, or indorser. 3 Burr 1677. Foulcs. 281. Earth 509.

But I have observed that a person not originally a party may become so by negotiation as if the Bill is indorsed to him - every indorsement creates a new party - And further one may become a party to a Bill by accepting it for the honor of the Drawer or indorser - the bill having been dishonored. The Drawer or indorser is supposed absent, & any person may by his own voluntary act, become a party by honoring the Bill (it is not necessary whether in reality the Drawer or indorser wished him so to do or not. This is called an acceptance *supra protest* for the acceptance is after the protest. He acquires certain rights - is liable to certain duties which will hereafter be considered. See 2 L. R. li. Placitum 33. 4. 456. Earth 129. Kid 15346. Chitty 23, 103, 180.

Lex Mercatoria. Bills of Exch. & Promy. Notes.

The acceptance *supra protest* is an acceptance for the honor of the drawer or indorser after refusal to accept by the drawer or indorser - but farther of ten the bill has been accepted by the drawer, & he has afterwards refused payment another person may become a party by paying it for the honor of the drawer, & this is called payment *supra protest*. 18 Ex. 112. Boas. Ex. Mer. Page 459. Kid. 154-5. Chitty 23. 115-163-164.

A person may become a drawer, acceptor, or indorser, not only by his own immediate act, but by the act of his agent or partners. And when one partner binds his copartner, he does it in character of an agent for the Partnership. 9 Co. 75. S. Ray. 930. 6 Mod 36. 12 Pl. 346. 564. -

And whenever a party, draws, accepts or indorses a Bill by the act of an agent, he is said to have done so by procuration. Boas. Ex. Mer. Placitum 83. Chit 24.

Now as the act of the agent is merely ministerial, persons incapable of binding themselves may as agents bind others. Thus if one employs an Infant, Feme covert or even an Outlaw & gives them authority to act for him. he will be bound by their acts. The agent in this case acts merely ministerially, & by so doing the rights of the agent as Infant, Feme-covert - or outlaw (if indeed an outlaw may be said to have any rights) are not at all invaded nor violated in consequence of the agency. He is merely the instrument by which the Principal himself is bound. 1 Inst. 52. Chitty 24.

Lex Mercatoria. Sitts Recht. Rom. J. Folio.

And it is a settled rule that an agent may be constituted for any of these purposes as well by Parol as by Deed. There is no need of a Power of Attorney to authorize another to make for me a simple contract, and a Bill of Exchange is a simple contract. (Acas L. Mr. Placitum 86. 12 Mod 564.)

A general agent, i.e. one acting under an unlimited authority, may bind his principal to an unlimited extent? But a special agent, i.e. one appointed for a special purpose & acting of course under a limited authority, can bind his principal only to the extent of that authority. If I give a man an authority to draw a Bill in my name for 1000^l he can bind me in a bill to that amount but no farther - On the other hand if I give a man a general authority to transact my business, to draw bills in my name to an indefinite amount he is a general agent & his acts will be binding upon me. 3 T. R. 757. 1 Esp. R. 111. 6 T. R. 591. 1 H. Bl. 155. 2 S. 618.

A person by signing his name to a Blank piece of paper & delivering it to another, authorizes the latter to fill it up with whatever sum he pleases. It is as Lord Mansfield says, an indefinite letter of credit. In Eng. where stamps are used, it could not be filled up with a greater sum than what is imported by the stamp, i.e. it could not be made binding upon the party to a greater amount. The rule was the same in this country in those days when the Stamp act

Lex Mercatoria. Bills of Exch. & Proxy. Notis.

was in operation in America). But where this Law of stamps does not exist & there is no restriction by Stat. the general rule holds. Doug 496. or 514. 1 H. Bl. 313. Wid. 110? Chitty 25-56.

I would observe that this rule does not hold in case, ~~where~~ a person signs as above & delivers it over to another if this other fills up the Blank with a Dred. There must be a special power to make a Dred. The rule holds, as to all mercantile instruments. Shep. Touch. 54. Park. S. 118. 4 Cruise Di. 26.

But an agent who is authorized to draw accept or endorse a Bill of Exchange cannot delegate his authority to draw &c. to a 3^d person unless he is expressly authorized so to delegate. It is a general rule in Legislative as well as Municipal Law that a delegated authority cannot be performed by Proxy. A Peer of Eng^d who derives his seat from a line of ancestry may vote by Proxy - but a representative of the people whose authority is delegated to him by the people, as a Commoner, cannot act by proxy. If then I delegate authority to an agent to act for me, & give him no power to delegate his authority, he cannot do it. 1 Roll 330. 9 Geo 75.

In drawing, endorsing or accepting a bill of exchange for a principal, the agent must do it, act in the name of the Principal. If he does not thus act in y^e name of the Principal, he ch. person will not be bound, but the agent himself will be.

Lex Mercatoria. Bills of Exchange. 406.

But if he does act in the name of the Principal, he himself is never bound, but the principal is. He must sign as agent. The most correct and approved way, is to sign thus "A.B. by C.D. his atty." It may be thus "C.D. atty. for A.B." & the result is the principal is bound in either case. 7 Co 75. Str 705. 6 T. R. 176. Com Dig. tit. atty. C. 14. 10 T. R. 181. 2 Str 953. Chitty 27. 56. 75.

One of two joint traders may by an acceptance in the name of both, & of the firm bind both, provided the Bill relates to the Partnership concerns. For the purpose of binding the Partnership by the act of one, each one of the Partners is an agent for the whole Partnership, & on this principle the act of one binds the firm. 1 Salk 125. 2 P. W. 175. 1484. Salk 297. 7 T. R. 107. 12 Mod 354. Peak R 16.

It is said however that the act of one partner, if it concerns only his separate interest will not bind the whole Partnership. This rule seems questionable, because there are opinions & I think reasonable ones, that the act of one partner - in the name of the firm - for his own separate interest will bind the whole Partnership provided the holder of the Bill did not know that the partner was acting for his own separate interest. If he did know it will not bind the whole Partnership. When partners enter into business, they are in principle bound to the acts of each other, and when the Partners are principals for the firm, it ought to bind,

Lex Mercatoria. Bills of Exchange & Promissory Notes.

the firm, also by this implied covenant. holder out to the world an innocent person may be defrauded. and it is a general first principle, that when one or two innocent persons have been injured by the act of a 3^d. he who has enabled this 3^d person to do the injury shall suffer rather than the other. *Balk 125. Peake R. 80. 2 Vern 277-292. Esp. de 524 Chitty 3. 28.*

It seems however that two persons, who are not now Partners, may by making a Bill payable to their own order, make themselves ipso facto partners as to that transaction, so that one may indorse for & bind both. It might seem that this doctrine is denied in a case before J. Mansfield where he admitted the testimony of Merchants to prove the indorsement not valid, unless made by both - But in the case before him the person did not sign in the name of both, but in his own individual capacity - So that J. Mansfield did not decide that it would not be binding on both, had it been signed for both. *Wal. Law Part. 253. Doug 653. Peake R. 16 Chitty 3. 27.*

If a Bill is drawn upon a Corporation, & accepted by one of the members as such, in the name of the Corporation - it will not bind, unless this person is authorized by the Corporation to accept & appoint for that purpose. It is not the act of the Corporation. The individuals composing a Corporation are unknown in y^e Law it being an ideal entity, & it can bind itself only

Sex. Mercatorum. Bills of Exchange Promy. & Vol.

by a corporate act, as by vote. There being no authority delegated the act of this person can't bind the corp.

When one Partner draws a Bill for himself & Partner, he should do it as for himself & the other or in the name of the Firm, else it is doubtful according to the English authorities whether the Partner who did not act, is bound. Our Sup^r Court have decided that both were bound the only one acting, provided the whole or Bill was drawn for a Partnership concern. 12th 126. S. Ray? 175-1484. 500g 653. Chitty 30. 56. 75. March 10. 1813 Sect. 3?

Form & requisites of a Bill.

No particular form or set of words is necessary in the creation of a Bill of Exchange - tho' there are ordinary words, which have become so established that they are usually followed. The ordinary way is "at such a time", or "so long after sight" "pay to A. B. or his order, or A. B. or bearer, or to the bearer" alone. But neither of these forms are essential; for the construction of all mercantile instruments is liberal. Hence a promise to account with A. or his order for a certain sum has been held to be a good bill. Com Ri tit. "Obligation" C. 12. Ryd 61. 12th 627. S. Ray? 1376. 3 with 217. Chitty 21. 58.

But the instrument must contain certain formal qualities else it will not operate as a Bill of Exchange. It will not unless containing these qualities operate as a legal instrument properly.

Lex Mercatoria. Bills of Exch.^e & Promy. &c.

properly so called, tho it may be evidence of a parol promise to pay. But it is mere evidence, and does not constitute an instrument.

In Treatises you will frequently find the Term "instrument" used. This word in the sense there used is no where defined. But by an "instrument" is meant such a writing, as may itself be sued upon, which lays a foundation for a suit & is the basis of a recovery. A Bill of Exchange, a Bond, a Bill & a Promissory Note is such an instrument. But there are certain unsealed writings which will not of themselves support an action - when a suit is commenced, it is brought on a parol promise, and these writings are introduced as evidence of such promise. These are, not "instruments". S. Ray. 1545. 2 East 359. Chitty 173. - 184 - 190 - 192.

The precise difference then is this - an "instrument" is a writing upon which an action may be founded; upon which the declaration is grounded; & which is the basis of a recovery. But a writing not an instrument is one which is only evidence of a parol promise. Without these essential qualifications a writing will not carry with it any internal evidence of a consideration - neither will it be negotiable - it is not a Bill of Exchange. 3 Will 213. 2 B.C. 1072. 5 T. R. 485. 7 G. 2 41. 1 W. B. 239. 242.

These substantive requisites are in reality, but Two - tho they are sometimes (illogically) divided into Three. The first is that the instru-

Lex Mercatoria. Bills of Exchange & Money & Notes.

instrument, be payable at all events, & not upon a contingency. The Second is that it be for money only, that is money & any collateral article, or money & a collateral act, (as labor,) and a fortiori not in any collateral article or act altogether. 3 Wils. 213. 2 H. R. 1072. 5 T. R. 485. 7 B. 241. 12 B. 239. Stra. 1151. 1271.

It is frequently mentioned as an additional requisite, that the Bill must not be confined in its payment to any particular fund. This is not in reality an additional requisite, but a branch of the first. The first is it is to be drawn payable at all events, & not upon a contingency. The reason of this requisite is, that if it were payable on a contingency, it would perplex mercantile transactions by embarrassing the credit of the bill. If then a writing in form of a Bill of Exchange is drawn payable on an event which may never happen it is not a Bill and therefore not negotiable. This if a writing is drawn payable on the day of A's marriage. This is not a Bill & indeed it is not an instrument according to the description before given it is mere evidence of a loan from one. The reason is as above, that it would perplex mercantile transactions, by embarrassing the credit of the Bill. 5 T. R. 485. 3 Wils. 213. 1 Bur. 523. Stra. 1151. Rip. 56.

And for the same reason if a written writing in form of a Bill is made payable out of a particular fund which may not be productive

Lex Mercatoria. Bills of Exch. & Promy. Notes.

it is not a Bill of Exchange & not negotiable. In-
deed if the bill is not negotiable at its inception
it can never become so, altho the fund on which
it is drawn may afterwards become product-
ive. Thus if I draw a bill of Exchange on B. pay-
able out of a particular fund which may become
productive, it is not a Bill of Exchange & of
course not negotiable but yet it is evidence
of a parole agreement. 2. Ray: 1362-1396-1553. 3 Wils.
207. Bl. R. 782. Stra 592-1151-1211. 4 T.R. 343. 1202 p. 280.

It seems however according to some opin-
ions that such a writing may be considered or
declared upon as a Bill of Exchange in an action
between the original parties. There are opposite
opinions, but the former I think the better one.
I can see no reason why it may not be consid-
ered as a bill; so far as respects the original
parties to it; but the reason is conclusive why
it should not be considered a Bill so far as others
than the original parties are concerned, viz that
were this the case it would tend to embarrass
purify commercial transactions. But the force
of this reason does not at all apply to prevent
its being considered a bill with regard to the ori-
ginal parties. This paper, medium is entitled to no par-
ticular protection, nor subject to any rules not common
to other instruments - except where they have been negoti-
ated. But where they have been negotiated, they are protected, & subject
to certain rules. 7 T.R. 243. Litt, 33-43. 5 T.R. 483. 6 T.R. 123.
2 B.C. R. 1072. Kay 58-65.

Lex Mercatoria. Bills of Exchange. (Vol. 1)

But to the general rule that a Bill may not be drawn exclusively upon a particular fund there is an Exception, where the event on which the payment ^{is to be made} is of notoriety, morally certain & respects trade. Thus it has been shown in § 1. a Bill payable in two months after a Ship is paid off is a good bill. The payment of the Ship crew &c is a matter of notoriety, the transaction respects trade, & so high is the credit of the English Shipping that it is considered morally certain. *Stoa. 24. 1401b. 262. Pub. N.P. 272. Ryd. 57.*

. And if the event on which the bill is payable is one which must inevitably happen at some future time, however distant, it is a good Bill. Thus if a Bill is made payable 6 months after the death of A. it is a good bill & negotiable. The day of payment will inevitably arrive - how soon is uncertain. So also a bill payable in one year after A becomes of full age, (specifying that time) is negotiable - for altho he may literally never attain full age (as if he dies) yet the bill is construed as one payable at that time when by computation he would attain that age, if he should chance to live so long. If the time is not specified it is not negotiable; it then depends upon a contingency. *Stoa. 1217. 1 Burr 226. Ryd 57. Chitty 13. 33. 4.*

But tho a Bill confined to a particular fund is not negotiable, yet the mentioning a fund

Lex Mercatoria. Bills of Exch. & Promy. Notes

merely to inform the Drawee how he may reimburse himself will not vitiate it. For here the Bill by the supposition is not drawn upon the fund, but one payable at all events. This bill imports a personal credit to the Drawee. Stra 762 L. Ray? 1481.

Barnard. 12. Dougl. 571.

The rule is the same as to words inserted in the Bill for the purpose of pointing out the consideration of acceptance. Here the a particular fund is named, yet the Bill is not confined in its payment to that fund. Thus where a bill was drawn "these words - pay so much, at such a time, 'value received out of my Estate at D.'" This bill is good, for the Bill is not drawn upon the fund itself, but it is mentioned for the purpose merely, of pointing out the consideration of acceptance. L. Ray? 1545, 70 R. 733. Ch. 4. Thus far as to the first requisites.

The Second requisite is, the Bill must be payable in money only. Hence an order payable in Goods is not a bill of Exchange. If I direct an order to a Merchant, to deliver goods, wares, & merchandize to A. this is not a Bill of Exchange and cannot be negotiated. The reason is Bills of Exch. were devised & adopted for the purpose of facilitating the remittance of money - they were never intended as a medium of barter or exchange; besides if an order could be construed into a Bill of Exchange, & made negotiable, it would greatly perplex commerce, & in many cases bear very

Lex Mercatoria. Bills of Exchange. Money. Notes.

hard on the drawer. As e.g. Suppose a man sh^d draw an order on his neighbor for 1000^l payable in Grimestones. & this order should be negotiated in Canada. The drawee would be compelled to pay ye bill only in the article specified - but he would be obliged to transport the article at an enormous expense - or do what he never intended, pay the amount of it in money. For this reason it is that a writing payable in any thing but money is not negotiable. Chitty 34. Kyd 50.

And further the bill must be payable in money only. A bill payable partly in money & partly in Goods, or partly in money & partly in labor is not negotiable for the same reason. Stra 1271. Kyd 50. Chitty 35.

It would seem hardly necessary to describe a bill payable in money only, as contradistinguishing it from one not so payable. I will barely observe that any order which cannot be complied with in any part but by payment in money, is a bill of Exchange within the meaning of the rules. 10 Mod 287.

It is not to be understood that those writings, wanting the necessary requisites of a bill of exchange, are of no force whatever. They are not bills it is true, yet as I before remarked they are evidences of a contract. Hence a writing payable on a contingency, may be enforced upon the happening of that contingency. So also if the party

Lex Mercatoria. Bills of Exch. & Prom. Notes.

on which the writing is drawn becomes productive, the parol contract of which the writing is evidence may be enforced, and I have already observed that the better opinion seemed to be that such writings, as between the original parties, might be considered & declared upon as Bills of Exchange. 2 B.L. 16. 1072. Ryd 58.

In the case of Foreign Bills of Exchange, it is usual to make three of the same tenor and date, so that if one or two of them should by chance be lost the money may be paid on the third. In such case to prevent more than one payment, they should in part be duplicatis or triplicatis; & for this purpose each one should refer to the others, & be made payable on condition that payment has not been made on either of the others. Chitty 45-46.

The Bill should always point out the payee, yet it need not name the payee, as it may be drawn payable to Bearer. It is said however that if the Bill does not designate any payee by name or otherwise, but designates the person of whom the value was received, that person shall be considered the Payee. As e.g. a bill drawn thus - "For value received of A. B. &c." here A. B. shall be considered the Payee. This is however questionable. Chitty 46. f. Pothier 176. B.L. 608.

It is settled that a Bill may be made payable to a fictitious payee - but the figure these Bills have lately made in the City of Westminster

Lex Mercatoria. Bills of Exch. & Promiss. Notes. 3

These renders it desirable that such Bills (payable to fictitious payees) should never again be allowed. There was a set of Speculating men in England, who drew Bills to a most incalculable amount payable to Pimsey Hargrave & Co. when in fact no such Company ever existed. It is evident that such bill must be payable to bearer else it is not payable at all. The bill was also indorsed in the name of a fictitious person - & therefore though the indorsement no title could be create. But to prevent such flagrant fraud from being practiced on innocent 3^d persons, it was definitively settled after much litigation, that a bill made payable to a fictitious payee or order, is in legal effect payable to bearer, as to such parties who knew the payee to be fictitious at the time they became parties to the Bill. but as to such persons who did not know the payee to be fictitious it was otherwise. Thus if the drawer knew the Payee to be fictitious at the time of acceptance, he is liable on the acceptance to a bona fide holder. But if he was ignorant of this fact, he will not be liable to pay the Bill altho he has accepted it. Such bills however have been highly censured & it has been often said, that a person drawing a Bill & indorsing a fictitious name upon it for the purpose of getting it into circulation & thereby injuring a 3^d person, is guilty of Forgery. 3 T. R. 174. 182. 481. 176 BC. 313. 386. 569. 256. 194. 288. Ky 208. 219. 227. Cl. C. 478.

Lex Mercatoria. Bills of Exch. & Promy. Notes

And a Bill may be made payable to one person for the use of another, & this is no objection to the validity of the Bill. The nominal Payee will have the legal power of transfer & there is nothing in it to prevent negotiation. Carth. 2. 2. 307. 6 T. 16. 123. Kyd 108. 1 H. Bl. 313. Chit. 48. 112.

Every Bill to be negotiable must contain operative words of transfer, i.e. words of negotiation. The word order or bearer or some word tantamount is indispensable; otherwise the bill is not negotiable. It is these operative words of transfer which make the Bill negotiable. A Bill payable to A. is an old fashioned chose in action, not negotiable. The term bearer or order is the most usual. A Bill payable to A or his assigns is negotiable. The word assigns is equivalent to order. They are both transferable only by indorsement; but where it is payable to bearer, it is negotiable by manual delivery. Boas 2. 16. 3. 3 Wils 211. 2 Stra 712. 2 Wils 353.

And a Bill payable to the "order of A." is the same thing in effect as a Bill payable to "A or order". When it is payable "to the order of A." it is sworn in strictness that it is to be paid to A's order & not to A himself. But this is not the construction put upon it - it is considered as the same as if drawn payable to "A or order." Carth. 403. 2 Shon 8. Kyd 108. Chit. 15. 134.

The words "value received" are according to all ordinary forms inserted in all Bills of Exch. But it is now settled that they are not necessary.

Lex Mercatoria. Bills of Exch. & Promy. Notes.)

either in the bill or in the indorsement. for in both cases a valuable consideration is presumed or implied. 2 Show 496. 5 Noy? 1481. 3 Wils 212. 8 Mod 267. 1 Hl. 310. Fort. issue 282.

But to enable the holder to recover interest and damages in default of payment or acceptance by the acceptor or drawer, these words (or value received) are made necessary by Stat. of 9. & 10th Wm. III. and 3 & 4. Ann. These two Statutes have then rendered these words necessary. but it is not a rule of mercantile law. Stra. 410. Kyd 71. Chilly 50-93-94.

I have already adverted generally to cases where the want of consideration in a bill to may be avoided. I have further to observe that if the bill is for accommodation merely, & that fact is known by the indorser at the time of receiving it, he can recover no more than he paid for the bill, tho the amount paid may be less than the nominal sum on the face of it. These accommodation bills are very frequent. E.g. A applies to B. for a bill of Exchange for 100^{ls} to enable him to pay raise money. B draws the bill in A's favor, & A. indorses the bill to C. for 50^{ls}. Now C. if he knows fact of its being an accommodation bill. can recover only the 50^{ls} which he paid for the bill.

1 Esp. R. 261. Pak. R. 61. 216. 2 Chalmers 248.

And here it may be laid down as a general and I trust an universal rule that in all cases in which a wife may ever be want of

Lex Mercatoria. Bills of Exch. & Promy. Notes. 3

consideration he may also over the consideration was illegal - & in many cases the latter defence may be made when the former cannot. 1 Bl. R. 445.

With regard to illegal considerations, it is an undoubted rule, that as between those parties immediately concerned in the illegal transaction is always a good defence. - As e.g. between the drawer, & the Payee. & between the Drawer & Acceptor. Doug. 614. 636. Ryd 280.

And a 3^d person knowing of the illegality at the time he became a party to the Bill, cannot recover upon it. Take the rules together - they may be exemplified by these 2 examples - A. draws a bill upon an illegal consideration payable to B. B. cannot recover vs A. They are privies to the illegality. - But further if B. endorses the bill to C. who also knows of the illegality - he cannot recover. 1 Esp R. 166. 6 T. R. 61. Contra 1 Esp R. 6. sem b.

If however a 3^d person, who having put his name on the Bill at the request of the holder, has been compelled to pay it, he may recover the amount paid, altho he knew it to be drawn upon an illegal consideration. But this right to recover is on the ground of the payment of the money. He, in putting his name to the bill to give it greater credit, is a mere volunteer, & stands in the nature of a surety - & is not considered' party to the crime. Stark R. 215. Chit. 523.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

March 11. 1813. Sec. 4. 2nd.

For the purpose of pursuing this subject, I will again remind you of the general rule before laid down - viz. that as between the parties immediately concerned in the transaction the illegality of the consideration is a good defence. And I would further observe that in general any holder of a Bill upon fair consideration, & having no knowledge of its original illegality, may recover upon it. This rule presupposes the Bill to have been negotiated; for according to the general rule it is not recoverable as between the original parties. These can't be ignorant of the illegality. A different rule then is adopted as to the subsequent holder of the bill, who came into possession of it fairly, & not knowing of the illegality of the consideration at the time of receiving it. And if he finds out subsequent to his receiving the bill of the illegality of its consideration, still he will not be deprived of his right of recovery. Ky D 280. Doug 614 or 636.

13 R 300. 3 Bl. 80 to 82. 454-537. 7 Ast 607. 8 Ibid. 390.
1 Bl. R. 445. 1155.

This then is the general rule - But it seems there is an exception to it, operating wth the holder when the bill is endorsed after it has become payable. You recollect, according to a former rule, that a Defend. had a right to question the consideration when the Bill is endorsed after

Lex Mercatoria. Bills of Exchange & Promissory Notes.

it has become due. Or that the jury might presume, upon trivial circumstances, the holders knowledge of the want of consideration. In such case as the Defend. may raise the presumption that the holder knew of the want of consideration, so also it is clear he may raise the presumption of the holders knowledge of the illegality of the consideration, where the Bill has been indorsed after the day of payment has arrived. *Kyd 283. 284.*

There is also another exception as third persons, who become holders in cases where the Statute-Law has declared the Bill void. That is, in those cases the holder the having no knowledge of the illegality of the consideration, yet he cannot recover. Thus Suppose the Bill is drawn upon an usurious consideration, or for money won at play, or in consideration that a Creditor will sign a Bankrupts certificate; in all these cases the Statute has declared the Bill void, & an innocent indorser cannot recover as the drawer, acceptor, or indorser. *Boug 646a 670. 276. R. 647. Stra 1155. Carth 356. East 92. 1 Esp R. 1274.*

The distinction then as it stands in the Books, so far as respects the present exception, is this -- If the consideration is illegal at C. S. the subsequent bona fide holder can recover, & this without exception. But where the Statute-Law has rendered the Bill void, even a subsequent bona fide holder cannot recover. But Among

Lex Mercatoria. Bills of Exchange & Money Notes.

much doubt that the reason of this distinction arises from the circumstance of a prohibition by C.D. in one case, & in the other by Statute Law. If the consideration is immoral at C.D. there can be no recovery as between the original parties. Suppose the Bill is given in consideration of the commission of a certain crime - now this Bill cannot be recovered as between the parties to it, but if it is negotiated, it may be recovered in the hands of a subsequent bona fide holder.

Why then can it not be recovered in the hands of a subsequent bona fide holder when the Statute Law has rendered the Bill void? It is not merely because the Statute declares the Bill void - the true reason I conceive to be this - where a Statute Law renders a Bill void, if even a subsequent bona fide holder were permitted to recover upon it, the Statute would always be defeated & evaded. & notwithstanding the Statute the party intended to be protected would be oppressed. e.g. The Statute declares a Bill drawn upon an usurious consideration to be void. The borrower, (who is the drawer) is intended by the Statute to be protected; but if by negotiation the drawer could be subjected, the object of the Statute would be entirely defeated. So also if a bill is drawn in consideration of a gaming debt - The Statute declaring such Bill void is intended to protect the loser - But he is not protected if he can be

Lex Mercatoria. Bills of Exchange & Promissory Notes.

subjected to the payment of the bill into whosever hands it may ever afterwards come. The Bill (if by so doing the drawer could be made liable) would always be negotiated. Again suppose a Bill drawn in consideration of the creditors signing a Bankrupts Commission. This is unjust & oppressive a fraud upon 3^d persons. & such bills are prohibited by Statute. But if the bona fide holder altho subsequent were permitted to recover upon it, the Statute also in this case would be evaded & the person whom the Statute designed to protect would be oppressed notwithstanding.

This reasoning will not apply to cases occurring under the C. L. prohibition. Suppose the consideration immoral as e.g. a bill given on consideration of perjury. Such bill is void at C. L. But if it is transferred to a 3^d person & he permitted to recover upon it, the object of the Law will not be defeated. The party will be obliged to pay ^{but} the money to an honest man. But the object of the Law would be defeated if the original party was permitted to recover upon it. The Law is not intended to injure a 3^d person, but to prevent a scoundrel from being paid for his iniquity. So when a bill is drawn in consideration of committing murder, the C. L. declares such bill void, & so it is so far as respects the original parties. but it is good in the hands of a subsequent bona fide holder. This criterion, I trust, will be found to run thro' all the cases.

Lex Mercatoria. Bills of Exch. & Promy. & Gold.

I do not apprehend that our late writers have laid down the distinction correctly, when they say that where a Statute Law prohibits there can be no recovery. You suppose a Statute makes that unlawful which was so at C. Law. Now if a bill is made on such consideration & transferred for a valuable consideration, I have no doubt but it may be recovered by a bona fide holder. Suppose e.g. a Statute is made prohibiting murder which was also prohibited by C. L. & a bill is drawn in consideration of the commission of this crime. The bill is doubtless void in the hands of the original parties to it - but there is no doubt if the bill is transferred but that it may be recovered in the hands of the bona fide holder.

This course of reasoning is also fortified by another consideration, viz. that where the Statute Law declares the Bill void there may be a recovery as between the indorser & indorsee - e.g. A. draws a bill on B. for an usurious consideration. Now the Statute declares such bill void & no recovery can be had upon it as between the original parties - but if it is negotiated to C. he may recover of the indorser. B. the indorser is not intended to be protected. The object of the Stat. is to protect A. the Drawer of the bill, & the borrower of the money, and further if C. indorses it to D. he, the 2^d indorser may recover of C. the amount. The reason is, the mischief intended to be prevented by

Lex Mercatoria. Bills of Exch. & Prom. Notes

The Statute is not let in. I have made these observations because I conceive there is no mystic difference between a Statute, & a C. D. prohibition. If a Bill is declared void by Statute, it is so, & equally so, if declared void by C. D. *1155. Doug 113-16.*

Mr. Chitty lays down a rule as between an indorser & indorsee, which is manifestly incorrect - it is that the innocent indorsee may recover of him only of whom he received the Bill. He cites no Authority for this rule, and I apprehend there is none. Chitty, 53. It is true when a Bill is transferable by manual delivery only, the holder can recover only of the person of whom he received the Bill. Had Mr. Chitty laid down his rule with reference to this case, & not to cases of illegal consideration, it would no doubt have been correct.

On the other hand, if a Bill which is good in its creation, is endorsed for an usurious consideration, & then passed to a bona fide holder, for a valuable consideration - he may recover vs the Drawer or acceptor - but not vs the indorser for the indorser is the person who is intended to be protected by the Statute against the usury. *1 East 92. 1 Sand 294. 3 T. R. 590. 1 Es 6 R. 273.*

In every Bill the Drawers name must be subscribed or inserted in the body of the instrument - and it must be thus subscribed or inserted by the person purporting to be

Lex Mercatoria. Bills of Exchange & Promissory Notes.

the drawer, himself - or by some person by him authorized to do it. as an agent. Boas S. M. Placem. 3 - L. Ray. 1376. 1542. Stra 399-609. 8 Mod 307. Chitty 55-6.

With regard to the Construction of a Bill of Exchange. I have to observe it is very liberal - more so than the construction of Quod. Therefore where one, for money acknowledged to have been received in the body of the instrument, gave a Promissory Note concluding thus "and which I promise never to pay" it was decided he should pay - for it was manifest it was a mere trick or at best an error. The intention of the Parties was evident, that the Note was to be paid. This is giving words a very liberal signification. 2 Atk 321.

It is upon this same principle of liberal construction, that a Bill payable to a fictitious person or order, is under certain circumstances effectual as a bill payable to bearer. Auth ante.

In general the Contract entered into or evidenced by the Bill of Exchange, is construed & takes effect according to the Law of the country where made - in other words the lex loci governs. As where a Bill was made in Leghorn & sent in Eng. It was proved that there had occurred certain events, which according to the Laws of Leghorn would discharge y^e Deft. He was discharged from y^e payment altho in Eng where y^e action was brought these events had no ^{such} effect to discharge him. Stra 733. 1 Bos & P. 141. 2 W & P 447. 2 H. Bl 603. 1 St. 126. 7 T. R. 242.

Lex Mercatoria. Bills of exchange & Promissories.

There is an exception to this rule with respect to the Times of payment, mentioned in the bill. This is regularly to be calculated according to the laws of the country where the bill is payable. Thus if a bill is drawn in London payable in Amsterdam "at two usances", the time of payment must be regulated according to the laws of Holland with respect to this usance - The drawer must suspect that the drawee will calculate the usance according to the laws of his own country. Boas & M. Plac. 251. Chitty 54.

As to the remedy upon a bill of exchange the form of it is & must be ^{regulated} according to the laws of the country where sought; but the extent of it, is to be according to the laws of the country where the bill is made. - The reason of the rule as it respects form is clear - for were it otherwise it would introduce into Courts of justice the greatest confusion. e.g. Suppose a bill drawn in Algiers is sued in Eng^d. the action must be a *quodammodo* on Debt. (Debt is not often brought, & the trial proceeds according to the laws of Eng^d upon this subject - now suppose the form of proceeding was to be regulated according to the form in such ^{case} in Algiers which was e.g. for the Dey to issue his mandate, confine the debt in a dungeon, in Irons, & deny him the privilege of a trial by jury &c. - A proceeding of this nature would be entirely new in the Cts of Westminster Hall, & productive of much confusion & mischief. But still the extent of the right is to be regulated according to the laws of the country where the bill was made. Boas & M. Plac. 134. Chitty 60.

Lex Mercatoria. Bills of Exchange & Promy. Notes.

A Bill when drawn must be taken effect
be regularly delivered to the Payee. This is a re-
quisite applying to all legal instruments. And a
person receiving a Bill in satisfaction of a debt, for
which he has not a higher security cannot reg-
ularly sue for the debt, until the day of payment
on the bill. because by receiving the Bill, he im-
plies, gives credit until the Bill is due. 12 Mod 517.
6 D. R. 52. 7 H. 64. 5 D. 513. 1 B. R. 106. 6 Com. Di. tit. "merchant" §. 17.

If a Bill is altered while in the hands
of the Payee or holder, in a material part, as in
the date, sum, time of payment &c. and this without
the drawers consent. he is discharged from the pay-
ment. even as respects vs a subsequent bona fide
holder. For altho the Law intends to protect these
instruments, & will frequently, oblige the Draw-
er to pay a subsequent bona fide holder, when
he could not be compelled to pay the original
party, yet the Law cannot go so far as to compel
a man to pay an instrument which he never
made. It is not his act & Deed. it is a forgery, &
the holder, however innocent he may be, can
never derive a title through forgery. It is also
a rule that the holder must run the risk of the
genuineness of the bill. the certainty of which
he may ascertain by enquiry. After alteration
in a material part the Bill is not genuine.
4 D. R. 320. 5 H. 367. 2 H. R. 141. And Staunton 225.

The rule is the same as to an acceptor

Lex Mercatoria. Bills of Exchange & Promy. Notes.

where the alteration is made after acceptance, & also as respects an indorser where made after indorsement, i.e. in both these cases the parties are discharged & no recovery can be had of them.

But the rule is different in case of a subsequent loss or a false holder where the Bill is altered in one case before acceptance, or in the other before indorsement. as e.g. a bill is originally drawn for 500⁰⁰ and is altered before acceptance to 5000⁰⁰. the ~~drawer~~ acceptor accepts it. He is bound to pay the amount. tho the Drawer is not. The party, altering, however can never recover.

Doas T. M. Placitum 194. you will find this doctrine in auth. last cited also & in Chitty 63.

But the consent of any party to the Bill will stop him from taking advantage of the alteration - if after the bill is accepted the Drawer consents to its alteration he is liable. tho the acceptor is not. 4 T. R. 320. Chitty 63.

The party thus making the unwarrantable alteration in a material part can never recover of any one. It is a forgery & he who commits it has no right of recovery in any case. 10 Co. 27^a.

The remarks I have thus far made, have necessarily been miscellaneous.

I shall now proceed to treat

The obligation incurred by the drawer.

The drawer by the very act of drawing & delivering the Bill impliedly engages with the Payee & with every subsequent bona fide holder that the drawer is legally capable of accepting the Bill - that he is to be found at the place described in the Bill - that on due presentment the drawer will accept it - & that on presentment for payment that payment will be made.

The drawer enters into these implied engagements not only with the Payee but with every subsequent bona fide holder - for the bill is drawn payable to order or bearer - & the obligation follows the transfer into whosoever hands it may come, & thro all its successive stages of negotiation. Thus if by a Promissory Note I engage to pay A. B. or order, I not only engage to pay A. B. but any person into whose hands the Note may ever be negotiated. Kyd 109. Doug 55. 226. B.C. 378 1 Esp R. 511. L. Ray. 7. Sha 1087. Chitty 63. 4. 70. 71. 72.

The Payee however may agree to assume these risks & then there is no such implied agreement in his favor - But ^{any} subsequent bona fide holder not knowing of this assumption will not be affected by it - for if so, he might be defrauded, and the rule is said to be the same where the drawer disavows his bill, i.e. disposes of it by way of sale. Chitty 123. 109. 226. R. 757. 1 Esp R. 447. 707. R. 55. 6.

Lex Mercatoria. Bills of Exchange - Promissory Notes.

If there is a failure of any the engagements just mentioned the drawer is liable immediately, altho the day of payment on the Bill has not arrived. For wherever an engagement is broken there is then an immediate right of action. He is liable immediately for the amount of the bill - in some cases for ^{damages} interest & costs. E.g. Suppos a Bill is drawn payable in one year. & the drawee is legally incapable of accepting the bill, the drawer may be sued immediately - and so if there is a failure of any other of the implied engagements.
2 H. Bl. 379. Doug 55. Boas & M. 469. Chitty 64-100-136.
1 Bur 669. 3 H. 1687. 6 H. R. 52. 159. 3 Wils 16-17.

The Drawer incurs these implied obligations whether the Bill was drawn on his own account or that of another - and the obligation continues even tho the Drawee should be prohibited by the laws of the foreign country to accept the Bill. & thereby rendered incapable of accepting. The Drawer assumes this risk, whether the laws will permit y^e Drawee to accept.
Boas & M. 469. Ky 8 110. 2 H. Bl. 378. Ky 8 117. 156. Chitty 64.

The holder however may loose the benefit of all these obligations on the part of the Drawer by his own negligence. In what manner he may loose them I shall explain hereafter.

I would observe by the way that as to bills the holder to the benefit of these engagements (or his favor) on the part of the Drawer.

Lex Mercatoria. (Bills of Exchange & Money). Notes.

the holder must do his duty. as where presentment & the demand is necessary, the holder must present the Bill, this is one part of his duty. And here I have to observe that, in some cases presentment is necessary and in all cases expedient where the holder receives the Bill before acceptance.

When the Bill is payable within a limited time after sight, presentment is absolutely necessary. The holder can never entitle himself to a recovery on such a bill, until after presentment for acceptance - for unless this is done, the day of payment will never arrive. 1 W. Bl. 565. Chitty 67. 86. 202. Kyd 117.

But in other cases it is not necessary, tho in general advantageous for the holder to present the bill, till it becomes payable. It is always said to be advantageous because it is the safer course - but it is not an act of justice due from the holder to the drawer or any other party to the bill - but it may render a recovery on the bill more certain & easy & therefore it is advantageous. 1 Bos. & P. 266. 1 T. R. 712. 5 Bur. 2670. Kyd 118. 2 Plow 496.

And even when the general rule makes it necessary for the holder to present for acceptance, he may excuse his omission to do it, by proving that the drawer (or other party) had no effects of the drawer (or other party) in his hands;

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

or by proving that the Drawer was insolvent, & this fact known to the Drawer or other party said. It also he may excuse the omission to present, by proving any fact in general which shows the party said has not been injured by the omission to present. 2 H. Bl. 336-569. Chitty 68-102-132-202-203-

Suppose the Bill is made payable at a certain time after sight, & the holder does not present the same for acceptance & then makes a claim on the Drawer. The Drawer says I am not liable, for you have never presented the bill to the Drawer, & he is always first liable. & according to the general rule the Drawer is not liable. But the holder may reply, it is true I have never presented the bill - but I can prove you had no effects in the hands of the Drawer & therefore no credit with him - or the Drawer is a notorious bankrupt & you will know this fact. Now here the holder can recover of the Drawer for there is no injury accruing to him by the holders omission to present the bill for acceptance. The excuse is sufficient.

The use of presenting a Bill is that in case it is not accepted, on notice of it being given to the Drawer he may recover the effects out of the hands of the Drawer. but here the Drawer has no effects of the Drawers in his hands & therefore he can't be injured by the omission to present. In either case the holder is recovered for his omission, so the general rule might require it.

Lex. Mercatoria. Bills of Exchange & Promy. Notes.)

March 12. 1810. Sect. 5th.

I have already observed that when a Bill is payable at a given time after sight, presentment for payment is indispensably necessary. Otherwise the day of payment will never arrive. The rule as to the time of presentment in such case is, that the holder must use due diligence - or in other words he must present the Bill in a reasonable time according to the circumstances of the case.

And here I have to remark as before that what is a reasonable time is before the facts are ascertained a mixed question - but they being ascertained it then becomes a Question of Law.

Ky & 117. 118. 2^d Vol 584. 7th R. 425. 1st T. 10. 167 - 512. 4th 143.
Doug 515. Bowers 3^d Vol. Placth 229.

Mr. Chitty, who by evident mistake lays down the same rule with respect to a Bill payable at sight - i.e. he says such bill must be presented for acceptance within a reasonable time. But this is certainly incorrect, for it is never necessary to present a bill for acceptance which is payable ^{at sight}, for by the terms of the bill it becomes payable ~~at~~ instantly it is presented. It is true when a Bill is payable at sight it must be presented for payment within a reasonable ^{time}, & this is the way in which the rule should have been laid down, viz that such bill should be presented for payment within a reasonable time. Chitty 67. 68.

Presentment should always be made within

Lex Mercatoria. Bills of Exchange from 4. Folio.

the usual hours of business - otherwise it is not deemed legal & the Drawee not bound to accept, and indeed the holder presenting not within ye. usual hours of business is considered not as doing his duty. *Kyd 125. Chitty 69. 148.*

But a neglect to present within the proper time, may be excused by the illness of the holder - as the case may be, by other causes. same auth?

It seems in strictness the Drawee should accept or refuse immediately on presentation. It is usual however to leave the Bill with him 24 hours that he may have an opportunity of examining the accounts between him & the drawer, unless ye. Drawer voluntarily accepts or refuses sooner. And if the bill is thus left and not accepted within the time, it may be considered as dishonored. *2 Ray? 281. Bowles & M. Black 17. Com. Di. li. "Merchant." K. 6. Kyd 126. Chitty 70. 72.*

But tho it is usual to leave the Bill 24 hours with the Drawee, yet the holder is not justified in doing this, if the Mail by which the notice of non acceptance is to be sent, goes out in the meantime. In such case he must insist upon acceptance or non acceptance before the mails departure, so that in case of non acceptance, he may give notice to ye. Drawer. *Com. Di. Supra. Chitty 70.*

If the Drawee is not to be found at the place described in the Bill, or it is ascertained

Lex Mercatoria. Bills of Exchange. &c.

that he never resided there - or having resided there has absconded - the bill in either of these cases is considered as dishonoured. For you recollect one of the implied engagements on the part of the drawer is that the Drawer is to be found at the place described in the bill. 1 Esp. R. 516. 2. Ray. 7. 743.

Bowes (Plact. 22 to 24. Kyd 125. 127. Chitty 70. 89. 128. 136.

But if the Drawer having resided in the place described has removed to another, but has not absconded, presentment should be made at y^e place to which he has removed. & in such case the Bill is not considered as dishonoured. And presentment should be made if possible to the drawer in person - but if he cannot be found by due diligence the holder is not bound to present to him personally - as suppose he has left the State Realm or Kingdom, the holder is not bound to follow him - in all cases presentment at his house is sufficient if he cant. be found by due diligence whether he has left the State or not. Stra 1087. 1 Esp. R. 511. Chitty 70. 135. 136.

If the Drawer is dead, presentment is to be made to his personal representatives, if the latter is to be found within a reasonable distance. If the representative is not within a reasonable distance, presentment made at the last place of abode of the Drawer will be sufficient. Pothier 146. Chitty 70. 71. 132. 136.

And what is a reasonable distance?

conclude is a Question of Law, in the same sense
that a reasonable time is a Question of Law.

I do not find this rule expressly laid down
but I have no doubt of its correctness. I have
thus far been treating of presentment for ac-
ceptance - I shall now proceed to consider the

Acceptance itself.

Acceptance is the act of engaging to com-
ply with the request contained in the Bill, i.e.
agreeing to pay it. And this acceptance may be
in writing or by Parol. Chitty 71. 75. 76. 200.

Acceptance by the Agent of the Drawee
is valid & will bind the principal - but if agent
if required by the holder must produce his au-
thority, else the Bill may be considered as dis-
honoured, for the holder cannot authoritatively know that
the Agent is authorized to accept - And it seems ques-
tionable whether the holder is ever obliged to acqui-
esce in an acceptance by an Agent - because it ~~and~~
multiplies the necessary proof - & I think he is
not bound to acquiesce for another reason which
is that the instrument purporting to be the a-
gent's authority may be fraudulent - or a forgery
& the holder ought not to be obliged to run this
risk. But if he does acquiesce the ~~as~~ principal
is bound if the agent acts under his authority.
Chitty 71. 72. 23. Bowers Plac. 37. 1 Esp. 16. 115. 269.

Acceptance by one partner for both or for
the Firm, binds the Company. But if a Bill is drawn

Lex Mercatoria. Bills of Exch. & Prom. Notes.

drawn on two persons, who are not partners, and accepted by one only, tho' in the name of both, yet the person not accepting is not bound for he is not a Partner, & the person accepting is not able to bind him who does not accept. For tho' by drawing a Bill two persons may make themselves ipso facto partners, so that a negotiation of it by one in the name of both, will bind both, yet here they are not partners & one cannot be subjected as such by the act of another who is a stranger. In this case the holder is not obliged to acquiesce in such acceptance, but may consider the Bill as dishonored.

B. & P. 228. Holt 297. Bowes 2128. Chitty 29. 73. 112.

If the Drawer is an Infant, or Female Covert, or is found otherwise incapable of accepting, the Bill may be considered as dishonored, and need not be presented, because by the supposition, the Drawer is legally incapable of accepting. This rule follows from the one before laid down that the Drawer is blindly engaged as to the Drawer's legal capability to accept the Bill. Chitty 63. 71. 2.

And a promise to accept in future may operate as a present acceptance, even tho' it is by Parol. Thus where on presentment, the Drawer said to the holder "leave the Bill, and I will accept it," it was holden a present acceptance, because it gave credit to the bill, & prevented the holder from protesting it. B. & P. 270. Coups 570. 3 Bur 1689. 1 Ark 64 or 44. 5 East 514.

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

Indeed it is a general rule, as you will find from the Authorities last cited, that an unconditional promise to accept in future is a present acceptance. And a promise by the Drawee to the Drawee to accept a bill which may be drawn hereafter upon him is binding, if attended with any circumstances which would induce a 3^d person to take it, else such promise might operate as a fraud upon 3^d persons. As when the Drawee wrote to the drawee to know whether he would accept a Bill, & the drawee answered that he would duly honor y^e bill, & the letter containing this answer was shown to a 3^d person which induced him to take the Bill. It was held on the Drawee was bound by the promise to accept, otherwise this 3^d person would be defrauded. But I trust this would not have been considered an acceptance as between the original Parties. Compt. 571. 573. 574. 1 East 98. Ky 874. 81. 1 Bower 454. 486. 1 Atk. 64. 611. 715. 3 Bur. 1663.

Acceptance after the day of payment will bind the acceptor - yet in such case the Drawee or indorser will be discharged unless duly notified of non acceptance & non payment at the day of payment. If the Bill has never been presented for payment until after the day has elapsed - the drawee or indorser is discharged of course, for y^e holder has not used due diligence - he has been guilty of neglect. 12 Mod 410. Chitly, 73. 74. 81.

Lex Mercatoria. Bills of Exchange from 7. 80. 90.

And in such case the acceptor is liable to pay on demand whatever time the bill had to run. It cannot then according to the nature of the case be payable according to the tenor of the Bill, for the day purporting to be the time of payment on the face of the Bill has elapsed. 2 Ray. 384. 574. Salk 127-129. Carth 45. Com R. 75. 12 Mod 410.

Under the English Bankrupt Laws, the drawer the having effects of the drawers in his hands, is not safe in accepting the Bill if he knows of the Bankruptcy of the Drawer - for the effects in his hands are now the property of the Assignees and if he accepts after knowledge of the Bankruptcy he will be compelled to pay the Bill - & also to pay to the Assignees the amount of the Bankrupt's property in his hands. But if he had no notice of the bankruptcy at the time of acceptance he will not be obliged to pay the Assignees - & even if he has not paid y^e bill but only accepted it, still y^e Assignees cannot draw the bankrupt's effects out of his hands - for after acceptance he is bound to pay at all events & the effects of the drawer he must be allowed to retain (i.e. sufficient) to secure himself. 2 H. Bl. 333. 7 T. R. 711. Chitty 74. 152.

The acceptance of a Bill may be either absolute, conditional or Partial. But the holder is not bound to acquiesce in any acceptance other than an absolute one - and any other acceptance

Lex Mercatoria. Bills of Exchange. Promiss. Notis. ()

acceptance he may consider as a dishonoring of the Bill. But if he is willing to acquiesce in any other acceptance the acceptor will be bound by it. (Pothier 47. Chitty 24. 74. 105. 180.)

If the holder is satisfied with a conditional acceptance or one varying in any way from the tenor of the Bill it may be so accepted - and then if he gives due notice of such acceptance to the prior parties they will be bound. But if he takes such acceptance & does not give notice to the prior parties he can have no claim on them - they are discharged. The reason is, the ~~notice~~ drawer is entitled to this notice that he may withdraw his effects out of the drawer's hands - and the indorser is entitled to notice that he may have the same chance as the drawer or any former indorser.

Stam. 214. 648. 1152. 1194. 1212. Com. 6. 452. 2 Wils. 9. 1780 182

And what amounts to an acceptance is a Question of Law. Exactly in the same ^{what is} sense as a reasonable time is a Question of Law. 1st R. 182. 186.

An absolute acceptance is an engagement to pay the Bill according to its tenor, & when a Bill is generally accepted, without any qualification, it is an acceptance according to the tenor of the Bill. But it is unnecessary for the acceptor expressly to say he accepts according to the tenor - it is an absolute acceptance if without qualification. Ryd 74. Chitty 75.

Lex Mercatoria. Bills of Exchange. Art. 75.

I have observed that an acceptance may be by Parol, but this is not usual nor is it safe, because the evidence of a Parol acceptance is much more precarious than an acceptance in writing. The usual mode therefore is to accept in writing.

The form of acceptance is usually thus: "accepted" & subscribed by acceptor's name. Or if the word "accepted" is written without signing his name, it is good - or it may be done by signature without any thing written over it. Chit. 73. 75.

When a Bill is made payable in a City generally, i.e. without specifying any place, it must by acceptance be made payable at a particular house or place in the City, or the holder may protest it. - You are not to understand by this that the acceptor will not be bound unless a particular place is designated - but the meaning is, the holder is not bound to acquiesce in the acceptance unless the acceptor will designate the place where the Bill shall be paid. 2. Ray. 574. Com R. 75.

The reason of this rule is obvious. Suppose a Bill is payable in the City of London. Now if he were not allowed to claim the right of having the place of payment specified in the acceptance the holder would be subjected to much inconvenience, for as the case might be he would be obliged to travel ~~all~~ an indefinite length of time over

Lex Mercatoria. Bills of Ex. & Prom. Notes.

this miniature of the world in search of the acceptor. It is for the convenience & security of the holder that he may claim such a specific acceptance.

I have stated the usual mode of acceptance, but in general any act of the Drawee, signifying his consent to comply with the request in the Bill, will be a sufficient acceptance. Thus where the Drawee wrote "Seen" on the Bill it was held an acceptance. So also in another case where he wrote "presented", and in another where he made a memorandum of the day of the month on the Bill, & in another where he wrote a direction to a third person to pay - these were all considered a good acceptance; and any thing of this nature will amount to an acceptance, altho written on a diff. int. piece of paper, if it relates expressly to the Bill. Comb. 410? B. & P. 270? Ky & 80. Vin ab. li. "Bills of Ex." § 4.

And a verbal acceptance tho' it is without consideration is binding in favor of the holder of the Bill - tho' as between the Drawee & acceptor the want of consideration may be availed, & I understand the rule to be the same where the acceptance is in writing. 3 B. & P. 1669. Chitty 77. 82.

But a promise to accept obtained by fraud or misrepresentation does not bind the acceptor. But this rule I trust is confined to the person who practiced the fraud. I can't conceive it extends to a subsequent bona fide holder, for if it does

Lex Mercatoria. Bills of Exchange & Promissory Notes.

The great principles of the mercantile Law will be defeated & destroyed. It is very important in a commercial point of view that the Bill should not be impaired in the hands of an innocent holder by the transactions of prior parties; and the general principle of the C. L. comes to this, for which is the most reasonable that the person who suffered himself to be deceived should be the loser, or an innocent holder of the bill who was wholly ignorant of the transaction? Clearly the former according to the C. L. principle. *Chitty 77. 3 B. & A. 1669.*

It appears from what has been said, that the acceptance need not be made on the Bill itself, it may be on a separate piece of paper, & an acceptance by letter will undoubtedly bind. *14 D. 69. 5 Tr. 640.*

And an acceptance may be implied, & even where there is no writing in the case. But to constitute such acceptance there must be some act or circumstance from which it may be inferred that the holder was induced from that act or circumstance to consider the Bill as accepted. Thus where the Drawer said to the holder "there is your bill, it is all right" the rule laid down by the Ct. was, that if by this expression the holder was induced to believe the bill accepted he should recover, secus if otherwise. (Qu. how did the Ct. decide? *T. F.*).
1 Esp. R. 17. Chitty 76. 77. 78. Hardw. Cas. 75. 278. 1 T. R. 289.

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

But an acceptance may be implied from the Drawee's keeping the Bill a great length of time, tho' this implication may be rebutted, as if the drawee had been taken suddenly sick so that he could not in any way attend to business & thereby prevented from returning the Bill in due season. This will rebut the implication. It is not however in general easily rebutted, but in cases *ut supra* it is. Such neglect to return is considered *prima facie* an acceptance. 1. Atk 611. Hardw Cas 278. Chitty 77.

And in general any act which gives credit to the Bill & induces the holder not to protest it, will amount to an acceptance. This is of course an implied acceptance. B. & P. 270. KyD 80.

An engagement to pay the bill, not absolutely, but on some contingency is called a conditional acceptance. The holder is not bound to acquiesce in such an one, but if he does, he must give notice of the nature of it to the prior parties else they will be discharged. The reason of this I have before explained. But tho' the holder is not bound to receive such acceptance, but receiving it if he neglects to give notice to the prior parties they are discharged, yet the acceptor is bound by the acceptance if the holder does receive it. Potheir. "Placitum" 47. KyD 161. Chitty 23. 74. 75. 79. 81. 103. 180.

For example, where a Drawee accepts in this form, "accepted on account of such a Ship who is lost for".

Lex Mercatoria. Bills of exchange. Promissory Notes.

for her cargo; this is a conditional acceptance; or when it is thus accepted when goods are sold it is conditional, & the holder is not bound to receive such acceptance, but the acceptor is bound according to the terms of it if he does receive it. Stam 1152. 1212. 2 Wils 9. 12 Mod 447. Comps 571. 12 R. 182.

Here by the way I would observe, because it may occur to you that the last rule is inconsistent with one formerly laid down viz that y^e bill is to be paid at all events & not upon a contingency, & answer) the Bill is still payable at all events. If the drawer refuse to accept the Bill at all events & not upon condition the holder may resort to the drawer & he is at all events liable. The rule is satisfied if the Bill is originally drawn payable at all events, for if the drawer refuses to comply with the request contained in the Bill, according to its tenor, the drawer is also for to liable. The drawer is not bound to accept absolutely - but he is bound to pay according to his acceptance. Such conditional acceptance becomes absolute however as soon as the contingency on which it depends takes place. E.g. if the drawer accepts to pay as soon as such goods are sold - such acceptance is conditional; but it becomes absolute whenever the goods are sold. Sha. 212. Com 571. 12 R. 182.

If the acceptance is in writing the condition intended should also be in writing, for

Sex. Mercatoria. Bills of Exchange. From 4. 10. 11.

a verbal condition annexed to a written acceptance will not avail the acceptor as to a subsequent bona fide holder, if he or any intermediate bona fide holder took it without notice of the condition. For otherwise an innocent holder would be defrauded by a private verbal condition of which he was totally ignorant. 20 Cuz. 286. or 296. Hardw. 1. 2. 3. Chitty 81.

4 Partial acceptance varies from both of the former. This is an unconditional acceptance as far as it goes, but varying from the tenor of the Bill. It is not an engagement to accept the bill upon a contingency - but an absolute acceptance varying, as I before said, from the tenor of the Bill. Thus if the Drawee accepts to pay part of the bill, or to pay it at a different time or place, or in a certain way different from that specified, it is a partial, tho' an absolute acceptance, as far as it goes. Stra 214. Comb. 452. 11 Moo, 190. Stra 1194.

This species of acceptance also, is one which the holder may refuse, & treat the Bill as dishonored. But if he does receive it, the acceptor is bound by it, & he must give notice to the prior parties of such acceptance else they are discharged. Chitty 81. 2.

And here I would remark that if upon a conditional or partial acceptance the holder gives the prior parties notice as of non-acceptance generally, he waives the acceptance,

Lex Mercatoria. Bills of Exchange. Notes.

because by giving notice of non acceptance generally, he shows he does not acquiesce in it such as it is, and besides by so doing he furnishes the prior parties with an inducement to secure themselves. The law therefore gives this general notice of non acceptance & avail himself of the partial acceptance besides. 15th R. 182. Chitly 82. 85. 157.

Whether an acceptance is absolute, conditional or partial, is a question of Law.

March 13. 1813. Section 6th.

You will perceive from what has been said that by an absolute acceptance the Drawer is bound to pay according to the tenor of the Bill - and by a conditional or partial acceptance he is bound to pay according to the tenor of such acceptance. 4th R. 174.

An acceptance is binding in favor of a 3rd person i.e. any one besides the drawer, the made without consideration, & altho that fact was known to the holder. It is of no concern as respects an indorser whether or there was a consideration or not between the Drawer & Drawee, moving to the latter. He is not bound to enquire, & even if he knows there is none it will not affect him. 1st R. 187. 188. 3rd R. 183. 4th R. 339.

Hence an acceptance by the drawer's executor will bind him tho he has no assets, i.e. it will bind him in favor of 3rd persons, but not in favor of the Drawer. If the executor has no assets, he will be personally liable. The ordinary cases the executor is not bound unless

Six Months. Bills of Exchange & Promissory Notes.

he has assets, yet in this mercantile instrument, he is bound by his acceptance whether he has assets or not. His character as Executor is not regarded but he is liable as any other person would be. Indeed an acceptance on the part of an Executor is an admission that he has assets to that amount, & he is precluded from ever afterwards averring that he had no assets, & this whether his acceptance is in writing or by Parol. This is not paying the debt of another, for the acceptance creates the debt, there was none before. And an indorsement by an Executor is the same thing. To be sure he may never want assets as between him & the indorser, but he is estopped from doing this as to a third person. It is here also an admission of assets. 2 H. 120. 622. 3 Wils. 2 Stra 1260. 2 Bur. 1225. 10 H. 487.

The obligation created by an acceptance is irrevocable. This does not vary from the rule common to all contracts. After acceptance he cannot be discharged in general other wise than by a satisfaction or by an express waiver on the part of the holder - as by a release. 10 H. 47. 1 H. 38. Chitty 13.

If the acceptance is made in foreign country, by the laws of which it originally is, & afterwards becomes invalid it is of no force in any other country. Stra 733. Chitty 59. 64. 33. Aff per 2. 7.

Sec. Mercatorie. Bill of Exchange & Sales.

But an acceptance may be waived or released by a bare parole assent of the holder without need of any writing. I hardly know any Mr. Gould, how this rule has been introduced into the Mercantile Law. For it is well known according to the principles of the Common Law, that when a right of action has accrued, the l. parole, yet it cannot be released otherwise than by deed. The rule is well settled however. Esp. 10 i. 47. Chitty 83. 197. Doug 247 or 236.

It has been said in one case that what amounts to an assent or agreement to discharge the acceptor from his acceptance is a question of fact for the jury to determine. This opinion is shaken by others indeed it seems to be overruled, for it has been decided that nothing short of an express agreement will amount to a discharge and what is an express agreement is a question of Law. It is true the question whether the holder said "I will discharge you," or "I do discharge you" or whether he gave a release or not &c. is a question of fact - but this being ascertained, it is then a question of Law whether there is an express agreement to discharge or not. Doug supra. Chitty 84. Esp. 10 i. 47. Ky 159.

By the holder of the Bill acquiescing in the release a release after the Bill is drawn but before acceptance. This does not discharge the subsequent acceptance. Because a release operates

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

only upon an existing liability. But in this case when the release is executed there is no existing liability - for he has not at that time accepted the Bill. 2. Kay's 65. 518. 519. 664. 3 Co 70^b.

A Parol agreement however between the acceptor & the holder to consider the acceptance as at an end, has been considered as a parol waiver or parol discharge. The term "parol discharge" may occur to you as improper, for in Law a "discharge" can be but by deed. The meaning of it, is that it amounts to a Parol waiver. And again, when the holder sent a message to the acceptor "that the business was settled between him & the drawer & that he need give himself no farther trouble," it was decided to be a waiver of the acceptance. Doug. sup.

And an entry in the holder's Books, opposite to the entry of the Bill, in these words "A's acceptance annulled" was considered as a discharge of the acceptance. Doug. supra. -

It has been a subject of doubt, whether the holder taking a part of the amount of a Bill from the drawer, and taking his, the drawer's promise to pay the residue (on the back of the bill) at an enlarged period of time, discharged the acceptor. I can see no possible reason, why it could ever have been in question if the acceptor was discharged. If the holder in receiving part of the amount from the acceptor had given him an enlarged time to pay the residue, the drawer doubtless would have been discharged. The

Lex Mercatoria. Bills of Exchange & Promy. Notes.

acceptors liability is first, & the drawer is second-
ary. The acceptor in both cases is likely to be ben-
efited by having the period of payment enlarged,
but in the latter case the drawer is not benefited,
as the acceptor, before the period agreed upon as 4th
day of payment should arrive, may become bank-
rupt - it is for this reason that in the latter case
the drawer is discharged. But giving this enlar-
ge time in the case supposed is so far from proving
injurious to the acceptor, that in all probability
it will be for his advantage. And how it can
be said, that that which will operate for his ad-
vantage can discharge him from his liability, I
cannot tell. Romy 248. Phill. 84. 156. 157 & 162.
(Esp. 16. 51.)

It has been determined that the altera-
tion by the holder of a partial into an absolute accept-
ance, and on refusal of payment, another alteration, res-
toring it to its original form, does not discharge the
acceptor. This is going very far, and even it is not
for the anxiety the Law has to keep up the credit of
these mercantile instruments & to protect 3^d persons
I am confident the rule would never have obtained.
No injury can perhaps result from it, but it is con-
trary to the rule of the Law that a person
altering a writing of any kind in a material part
he cannot recover upon it. Here the acceptance as written
is not in fact, part of the acceptor. This acceptance has
once been erased, one of a different kind substituted.

Lex Mercatoria. Bills of Exchange & Promy. Notes.

& then one similar to the actual acceptance of the
Drawer put upon the Bill, & this by the holder. -
The rule is however established upon pretty good au-
thority. See *Bowis v. Plant* 222. *Maloy* 28.4 *T.R.* 336. *Chit.* 85.

When a future consignment to the acceptor
& a prospect of profit from it is the consideration of
acceptance, the holder agreeing & actually taking
a Bill of Exchange from the acceptor is a discharge
of the acceptance. The consideration of accept-
ance being removed, & that by the act of the holder
himself. he has no right to complain that the
acceptance is discharged. *Chitty* 85.

And where a holder agreed with the ac-
ceptor that if he would make an affidavit that the
acceptance was forged, he would not sue him,
& he did make the affidavit, it was held that
the acceptor was discharged, altho the affidavit
was false. The condition on which the holder agreed
to discharge the acceptor was performed, & it was
immaterial whether the affidavit was false or
true. *Peck* R. 187. *1 Esp.* R. 148.

And a conditional or partial accep-
tance is discharged, by the holder sending notice
to the prior parties of a general non-acceptance.
I gave you this rule in a former lecture for an-
other purpose. *1 T.R.* 182.

As the drawer by his acceptance makes
the Bill payable at a particular house, as at a
Bankers, & the Bill is not there presented for payment

Lex Mercatoria. Bills of Exchange & Promissory Notes.

the acceptor is discharged, provided he would be injured in consequence of the Bill's not being presented for payment at that particular place. Suppose a bill is accepted, to be paid at a Bankers, & the holder neglects to present it there, & the Banker fails. Now the acceptor is discharged, for otherwise he might be defrauded - as confiding that the holder would comply with the terms of the acceptance, he has been induced to suffer up money, which he had appropriated for the payment of this bill to remain in the Banker, & the Banker has failed. If he were not discharged then, he would be a loser to the amount of the bill, & this thro the negligence of a Stranger. 2 Stra 1195.

The act of acceptance, when there is nothing in the terms of it to contradict it, implies that the acceptor has in his hands effects of the Drawer to the amount of the acceptance. If then the drawer is afterwards compelled to pay the Bill, he may recover of the acceptor. This rule presupposes that the acceptor is unable to prove he had no effects of the Drawer in his hands. Bowes 455. Wils 185. Palk 130. 12 Kay 388. Ky 156.

If however the acceptor, in point of fact has no effects, but pays the Bill, he has a remedy vs the drawer; but the onus probandi as to the fact of his not having effects lies upon himself, i.e. the Acceptor. Ky 156. Chitty 163. 171. 203. 205.

Lex Mercatoria. Bills of Exch. & Promy. Notes.

As to all the other parties, i.e., all except the Drawee, the acceptor is considered as the original debtor or the person first liable. This will appear manifest upon considering the nature of a Bill in all its stages. A draws a bill of Exch. upon B. in favor of C. and B. accepts it. Now C. must call upon B. before he can upon A. for the engagement of A is to pay provided B. does not. A's liability is secondary. Suppose the bill is indorsed, the engagement of the indorser is that he will pay if the acceptor does not. An indorser then has three claims, one upon the acceptor, then upon the indorser & finally upon the Drawee, and he may sue them severally until he obtains full satisfaction. 11 Wils. 137. 190. Salk 127. 131. Hy 151.

If the holder makes the acceptor his executor, & then dies, the acceptor is discharged, and if he is discharged the others are of course. if the original liability is released the secondary must be. The Drawee or indorser never incurred any liability to pay the holder, if by due diligence he could recover the money from the acceptor; and here instead of using due diligence he has voluntarily released him - and it is the same to the Drawee or indorser, as if the acceptor had paid the bill. The reason why the acceptor is discharged is, that ye right & duty write, & if an action was brought he would be both 1st & 2d defd. 1 Roll 222. Plowd. 184. 543. Salk 299. 2 B.C. 511. 512. 3 S. 6. 18.

It is not to be understood however that this claim of the deceased holder cannot be enforced for no purpose; for as between the Creditors of the deceased & the Executor, the acceptor, it may be enforced in Equity but at Law it is gone forever.

Of the effect of Nonacceptance, & the duty of y^e Holder of the Bill when Nonaccepted.)

You recollect that it is the duty of the holder to present the Bill for acceptance, in that case only where it is payable a certain time after sight. But if in this, or in any case presentment is made, & acceptance is wholly refused, or is made partially or conditionally, notice must be given of the refusal, or of the nature of the acceptance (as the case may be) to the prior parties, i.e. to all the parties on whom the holder can claim, else in general they will be discharged. The reason of this rule was before explained to be, that y^e prior parties were intitled to this notice as an act of justice from the holder, that they may have an opportunity of securing themselves. 5 Bur 2670. 1 S. R. 712. Point 45.

It was formerly holden that any of these prior parties to take advantage of the omission of notice must prove actual damage sustained by the omission. But this rule has been exploded. He is not now bound to prove any damage sustained, per

Lex Mercatoria. Bills of Exchange & Promissory Notes.

For the drawer is presumed to have effects in the hands of the drawee, & the indorser is presumed to have paid the value of the bill. If the holder has neglected to give the necessary notice, it is incumbent upon him when he sues the prior parties, to show the latter have not sustained any damage by the want of notice, & if he can do this he may recover. 10 T. R. 406. 409. 3 H. 182. 2 H. 130. 612. Ky. 8. 129.

Hence if the holder can prove that from the date of the Bill to the time of payment, the drawer had no effects in the hands of the drawee, the drawer is *prima facie* not entitled to notice, and the onus probandi is now shifted to the drawer - for if he had no effects in the hands of the drawee, there was no need of giving him notice, that he might secure himself. 10 T. R. 405. 712. 2 H. 713. 5 H. 239. 2 H. 130. 610. 1 Bos. & Pul 652. 3 H. 230. 2 Esp. R. 515. 3 H. 158.

But if the drawer, not having notice, had effects in the drawee's hands, the fact that he had actually sustained no damage does not dispense with the necessity of notice. This rule is inflexible. For the inquiry of his sustaining actual damage will lead to a very loose examination - and the holder not having done his duty, the Ct. will not go into the inquiry whether damage has been sustained or not by want of notice. 1 Esp. R. 333. 3 Esp. R. 158. 7 East 309.

It is said the Payee of a Promissory Note

Lex Mercatoria. Bills of Exchange. Promiss. & Volus.

involving it with a knowledge of the maker's insolvency cannot defend on the ground that he had no notice of the nonpayment. This rule is questionable & questioned. 2 H. Bl. 336. 1 Esp. N. 302. 303 note. 2 H. Bl. 604. Park R. 203 note. 2 Cairns 343.

I have observed that if the drawer had no effects in the hands of the drawee, he is not entitled to notice. And the rule is the same as to a p.p. drawer, tho an indorser had effects in the hands of the drawee, for if the drawer had none he can't avail himself of want of notice. 1 Esp. N. 515.

And it has been determined that securities lodged by the drawer with the acceptor for the purpose of raising money, but on which no money has ever been actually raised, are not such effects as entitle the drawer to notice. In other words securities are not effects within the meaning of the rule. They are not the property of the drawee, he is a mere bailee of them. 1 Esp. N. 516.

But if the drawer had effects in the hands of the drawee at the time of drawing the Bill, the subsequent death, bankruptcy, or known insolvency of the drawee will not dispense with the necessity of notice. For notwithstanding all these it does not follow but that the drawer may be fortunate enough to secure himself. Doug 497 or 515. 1 H. N. 408. 2 H. N. 336-7 H. Bl. 612. 7 East 359. 1 Esp. R. 334 note.

The rule is the same in favor of an indorser.

Six. Mercatoria. Bills of Exch. & Prom. Notes.

indorser for a valuable consideration - he is entitled to notice for he is liable as well as the drawer, & when on such acceptance, no notice is given him he is discharged, the same as if drawer. same auth.

And the drawer, ~~not~~ having informed the drawee before presentment that he could not honor his Bill, is no excuse to the holder for not giving notice, for altho he did so inform the drawee, yet he may have changed his mind - & it is the duty of the holder to inform in case of non acceptance.

276. BC. 612. 336. 5 T. R. 239. 10 B. 405. 712. 285. BC R. 390. 824
1 Bos. & Pul 652. 1 Esp R. 332. 515.

I have already observed that the drawer is presumed to have effects with the acceptor - this presumption arises from the fact of acceptance. On the other hand if the drawer has no effects that fact affords a presumption that he has sustained no injury from want of notice. According to some opinions this presumption may be rebutted by proof of actual damage - according to others, it cannot be rebutted; i.e. some say he is not entitled to notice if he had no effects in drawee's hands; others say, that he is not, *prima facie*, entitled to notice, but if he has sustained actual damage, he may defend on the ground of want of notice. It is true a case of this kind will seldom occur, but there is one of the kind to be found in 7 Eng. L. auth. (see the case cited on 7th next page. 3. R.) 2 T. R. 713. 1 B. 714 Kyd 131. to 136. Peak R. 203. Note. Sw. & C. 290. Chilly 87. 89.

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

This is really a question on which I think much may be plausibly said on both sides. For myself, I have no doubt but that he is entitled to notice whether he had effects or not in the hands of the drawer - and this want of notice is a good defence if he sustained actual damage thereby. The objection to this is, that he had no right to draw the bill, but he can't be said to be guilty of a wrong in drawing a bill on a person in whose hands he had no effects. And as the case may be, he may be a sufferer by neglect of notice, as was evident in the English case. It was this - A in Canada had effects in the hands of B. in London B writes to C. requesting him to draw bills on C, who, (C) had effects of his (B's) in his (C's) hands. A drew Bills on C. in favor of D. and B. became a bankrupt. C. refused to accept the bills. and on action, in favor of D. the holder, vs A. the drawer, the question was whether A. was entitled to notice of the nonacceptance of C. - It was decided that he was entitled to notice altho he (A.) never had any effects in the drawer's hands; because had the holder notified him of the nonacceptance, he would no doubt have taken measures to have withdrawn his effects from B's hands B, of which he was now prevented by his (B's) Bankruptcy. Here then A. suffered a special damage owing to want of notice, i.e. if he was to be made liable as drawer of the Bills in question.

It has been determined that if the drawer

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

if the drawer is a Bankrupt at the time of the refusal to accept, notice of non-acceptance is unnecessary. I think this an unreasonable rule. What if the drawer is a Bankrupt? His effects are consigned to Assignees, & yet he cannot avail himself of the refusal to accept, yet the assignees may, for they have the same interest to withdraw the Bankrupt's effects from the hands of the drawer, that he himself would have had, had ^{he} not been a Bankrupt. Lord Thurlow has laid down the rule, but he furnishes no reason for it. There is a case in Cook's Bankrupt Law (infra) which I think implies a contradiction, & the latter in my opinion is the more correct. 3 Bro Chy. 6. Cook's Bankrupt Law 168. Chitty 69. 89.

If the drawer absconds there is no need of giving notice, for the holder is not obliged to go in search of him. 1 Esp R. 516. And the neglect of giving notice is excused by the death or sudden illness of the holder, if notice is given as soon as possible after the impediment is removed. Collier "Stacitum" 144. Chitty 89.

If the drawer makes a conditional acceptance, the terms of which are to be complied with by the holder, and the holder does comply, no notice is necessary, for by the compliance of the holder with the terms, the acceptance becomes absolute, and when the acceptance is absolute there is never any need of notice. Thus when the Drawer said "I will accept the Bill provided

Lex Mercatoria. Bills of Exchange & Promissory Notes.

you will indemnify me as a 3^d person for paying y^r money to you", and the holder did indemnify him, the acceptance was held to be absolute, & of course no notice necessary. Chitty 89. 90. 101.

If the Drawer accepts absolutely for part of the amount only, the prior parties, i.e. y^r drawers & indorsers are bound to the extent of that acceptance without notice: for so far the acceptance is absolute. & if a bill is drawn for 1000£ and the drawer accepts it for 500£. the drawer is bound to pay the 500£ & this without notice. But as to the other 500£ there is a non acceptance as to that, & the prior parties cannot be subjected to pay it, unless they are duly notified of such non acceptance as to the 500£.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

March 15. 1813. Sect. 7th.

I was in my last Lecture treating of notice, necessary to be given to Prior Parties, of nonacceptance. The mode & manner in which this notice is to be given is different in case of a Foreign from that of an Inland Bill of Exchange. In the latter case no particular form is necessary. Ryd 136 142. 10.R. 170. Chitty 90.

In case of Foreign Bills, when not accepted, a Protest is necessary, and notice without Protest is not good. This is a rule of Public Law - the Law of Mercantile Nations in general. It is not founded on the Municipal Law of Great Britain or of any other country. The rule on this subject is imperative, so that the want of Protest cannot be supplied by any proof - the testimony of witnesses cannot be substituted there must be a Protest. 2. Ray 993. 6 Mod 8. Salk 131. 2 D.R. 713. 5 Bb. 239.

This form it seems is made indispensable by the usage & consent of nations, that there may be an uniform rule - for there is no other reason why evidence of nonacceptance may not as well be given otherwise than by Protest, in case of Foreign as Inland Bills of Exchange.

This protest is to be made by a Notary Public. For the purpose of making this Protest regular after a refusal to the holder to accept the Bill, a presentment of the same Bill is to be made again by the Notary Public & if on this second presentment the Drawer refuses to accept, the

Lex Mercatoria. Bills of Exchange. 801.

the Bill is to be noted for nonacceptance, and then a formal declaration of the refusal is to be annexed to the Bill, i.e. a Protest is to be entered up on it; and if the Bill is lost, or not to be found a Protest may be made on a copy. Chitty 40. 91. 128. 136.

And to this Protest, so made by a Notary Public full credence is given by all Foreign Courts of Justice - for a Notary Public is an officer acting under Public Mercantile Law not under any Municipal regulations of the country where he resides, or any other country. Skinner 172. Chitty 91. 136. 164.

The noting the Bill for nonacceptance does not itself amount to a protest. nor will it supply the place of a protest - nor is it even evidence of a protest. 2 T.R. 713. 4 B. 175. 3 P. 271. 14 D. 137.

And this Protest is regularly to be made by the Notary Public himself, not by any of his subordinate officers, as a Clerk &c. for this subordinate officer is not recognized as a public officer. 4 T.R. 175. 14 D. 137. Chitty 91.

If however a Notary Public cannot be obtained within a reasonable distance, as is often the case, the Bill may be protested according to English principles, by any substantial Person of the place where it is dishonored, in presence of two or more witnesses.

The Protest is dated on the same day, on which the notice of protest is given. The presentment.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

presentment of the Bill, must be in the regular hours of business, & the Protest is to be made at the same time. It must be made in the regular hours of business, or between sunrise & sunset. Chitty 91. 95. Ryd 137. 143.

The protest must conform in its structure to the custom & form of the place, where made. The forms of Protest are different in different countries. If the protest is made in Eng^t it must be regular in its structure according to the English form; if in France, according to French forms. Chitty 92. 157. 161. For form see Ryd 144.

The protest is generally to be made at the place where the Bill is dishonored. But still if the Bill is directed to one at A, requesting payment at B, protest may be made at either place. Chitty 92.

And a copy of the Bill is always to be prefixed to the protest - but a copy of the protest need not accompany the notice of non acceptance the notice of the protest must be given. As a protest of the Bill is a necessary & indispensable part of the proceedings, so notice of the protest must be given, as well as notice of non acceptance. But still a copy of the Protest need not accompany the notice of non acceptance. 2 H. Bl. 569. 1 Esp. 101. 12. B. N. P. 271. 12 vol 45. 12 Mod. 309.

And it is not necessary to send 4th protest Bill. itself. Chitty 92.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

(With respect to *Irish Bills* I have observed the form was different. Upon non acceptance of such Bills no protest is necessary. Any act evincing the drawers refusal, & proved as facts are ordinarily proved is sufficient to subject the prior parties. 6 Mod 80. 1 Tulk 131 3 B. & P. 69. 5 W. 992. Chitty 93.

It is said in one case, the notice must express the holders intention not to give credit to the drawer. This I think is questionable. All the reason why notice must ever be given is, that prior parties may secure themselves. Upon notice then of non acceptance they will know that they, as matter of course, are liable to the holder of the bill. & therefore I conceive it is not necessary that the holder inform the prior parties in so many words that he will not trust to the credit of the drawer. 1 T. R. 169. Chitty 93. 97. 98.

But the by Common Law in *Irish Bills* when dishonoured does not require a protest, yet by the English Statute 3 and 4 Ann a protest is required for the purpose of entitling the holder to costs interest & damages. This Statute is not made for the purpose of subjecting the prior parties, for they are liable to the amount of the bill without protest & notwithstanding the Statute. It is a more municipal regulation, introduced by the above Statute, which at E. I. was unknown. 1 Stra 410. Chitty 93. 94. Ky 150.

For a protest when made under this Statute

Lex Mercatoria. Bills of Exchange & Promy. Notes.

is to be made by the same person, & in the same way, in which it is to be made upon a Foreign Bill of Exchange. *Chitty, 99*

But tho a protest is not necessary in case of an Inland Bill, except under this Statute, yet notice of non acceptance must be given as well of an Inland as of a Foreign Bill, & this independently of the Statute, & for the same reason: *Kip 150.*

In case both of Foreign & Inland Bills notice sent by mail is sufficient, even tho the Letter containing it, miscarries. For it is not supposed that the holder is obliged to go personally, or to send a hand to inform him of the refusal to accept. He is obliged to do no more than is ordinarily done, that is put the notice in such a train that it is altogether probable the proper parties will receive it. The ordinary mode then is to send by Mail. *2 H. B. 309. Barnard. 199.* - *Pothier* lays down a different rule. See *Pothier "Black." 48.*

And when no Mail goes to the place, where notice is to be given, sending by the first ordinary & direct mode of conveyance is sufficient, though an earlier accidental conveyance might have occurred. *2 H. B. 565.*

As to the Time of giving notice, a delay may be excused by inevitable accident, as sickness, robbery &c. But in general it cannot be excused, except by some cause, beyond the control of the holder. *Pothier 144.*

Lex. Mercatoria. Bills of Exchange & Promy. Notes.

Notice of non acceptance, & in case of Foreign Bills, of protest also must be sent in a reasonable time - and it must be sent to all the parties, to whom the holder intends to resort for payment. If he is satisfied with the responsibility of the Drawer alone notice to him only is necessary. But if he intends to resort to the Indorser as well as the Drawer, he must give notice to both.

2 H. Bl. 569. B. & P. 271. Kyd 128 to 129.

What this reasonable time is, is a Question of Law after the facts are ascertained. before they are ascertained it is a mixed Question of Law & Fact.

Formerly much more time was allowed than at present. Notice of non acceptance within 2 months was formerly held sufficient. But now it is settled, that the notice must be given on the day of non acceptance, if any mail or ordinary conveyance goes out on that day. if there is none, notice must be sent by the next conveyance or mail by which it can be sent. 4 T. R. 179. 2 Ray. 743. 2 Stra. 829. 2 H. Bl. 565. 1 T. R. 168.

And if the party to whom notice is to be given resides in the place where acceptance is refused, notice of the refusal, if possible, must be given him on the same day. As in case the prior parties live out of the place, notice if possible must be sent them on the day of refusal, so if he lives in the place, he is equally entitled to notice on the same day. 1 T. R. 169. Kyd 126.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

It was once holden that the notice required must come from the holder himself, but it has been since determined by Lord Kenyon that notice from the Drawee is sufficient. - it is enough if the Prior Parties have notice whether it come from the Drawee or the holder. 17. W. 167. 11. B. Chitly 98

And it seems that notice by one party, having a right of action on the Bill, will inure to the benefit of other Parties who have claims on the Bill. It will operate in favor of the latter & those who stand before them. Thus if the holder is an indorsee, & gives notice of nonacceptance to the Drawer & Indorser, and then compels the Indorser to pay - now the Indorser may recover of the Drawer, without his (the Indorser) giving notice, for the holder has given him the necessary notice, & there is no need that the Indorser should again inform him. So also if the 2^d Indorser gives notice to the drawer of nonacceptance, this will operate in favor of the first Indorser, if he should be compelled to pay the Drawer. - Chitly 98.

And this notice required by former rules should be given to all the Prior parties to whom the holder intends in any event to make liable, or to resort for payment. If this notice is not given to a particular Party, that Party is discharged. Suppos. the holder gives notice to the Drawer & not to the Indorser. now he may resort to the Drawer but the Indorser is discharged. As if A. draws on

Tex. Mercatorum. (Bills for Cash & Promiss. Notes.)

A. in favor of C. and C. endorses it. to D. and D. endorses it to E. and E. gives notice of non acceptance to the Drawer only - he can't resort to any other party who had no notice. 5 Bur. 2670. 10 Int. 48. 15 B. 712.

I have observed that in general when the drawer has no effect in the hands of the Drawee no notice of non acceptance need be given him; but still this fact (of no effect) does not dispense with the necessity of notice to an Indorser to whom the holder intends to resort. No notice is necessary to the Drawer; for he has never parted with any value for the Bill which he has put in circulation but the indorser has paid a valuable consideration and he is to pay if the acceptor does not, & therefore he ought to have notice that he may secure himself vs the acceptor or as the case may be vs the Drawer. 15 B. 712. Park R. 202. 203.

On the other hand if notice is given to 2^d Indorser only, want of notice to the Drawer, will not avail him (the Indorser, - the formerly considered different. For it is not material to him whether the Drawer has had notice or not - it is sufficient if he himself has been furnished with notice so that he could secure himself. And in any Indorser is, in effect, as to every subsequent holder in the nature of a new drawer. This is apparent from the structure of a Bill. A Bill is drawn requesting y^e pay^r of a sum of money to A. B. - now A. B. endorses it requesting y^e same sum p^d to C. D. he is then in y^e nature of a new drawer. Sha 441. 2 Bur 669. 15 B. 334.

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

For the former opinion suggested in the last principle see Talk 131. 133. 2^d Ray. 443.

I have before observed, for another purpose, that the consequence of neglect to give notice of non-acceptance, may be waived or avoided by matter of post facto. I here repeat the rule for the purpose of giving examples and authorities.

Thus if after a Bill has been dishonored by the Drawee a prior party pays a part of the amount, this is in legal effect a waiver of the objection arising from want of notice, & admits his liability. The rule is the same if instead of paying a part, he promises to pay the whole - here again he admits his liability. Str. 1246. 2 T.R. 713. B.N.P. 276. Talk R. 202. Esp. 1257.

It has indeed been held however, that if the promise is made without the knowledge at y^e time of the fact of non-acceptance, y^e party is not bound. But this appears to be overruled for it has been resolved that such promise is an implied admission, that due notice has been given, & supports the averment of this notice in the Declaration. 1856 the former rule, see 3 Burr. 2676. 1856. 712. For the rule as it now stands see, 1 Esp. 12334 note 12 East 469. 7 Ab. 231. 236. 1 Bos & P. 326.

It has been determined by Lord Kenyon, in one case, however that a Promise by a Plaintiff, without knowledge of the legal consequence of want of notice does not bind him. 2 Kings

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

decides this case, in this way, the notice had been actually given. but it appeared the Defend. had not knowledge of the legal effect. The case was this. The holder of the Bill gave the Drawer an enlarged time for payment - now this would discharge the Drawer, but still he promised to pay the Bill, and Mr. Kenyon decided he was not bound by the promise for the above reason. This case is nowhere to be found except in a note to Chitty 102.3. 158.

I think the above rule Questionable. For it is an undoubted principle of Law, that a man can never discharge himself from a liability by a plea of ignorance. The rule should be condemned as inconvenient, for the looseness of the inquiry as to his ignorance of the Law is sufficient to convince me of its incorrectness. Now by the holder giving the Drawer an enlarged time to pay the bill, he clearly discharges the Drawer - but a promise to pay after notice of non acceptance I conceive to be good. If this decision had been that the promise was a nudum pactum, as made without consideration, it would have been different. But this would contradict a former rule, that the acceptor of a bill could not aver want of consideration in any action brought by a subsequent bona fide holder of the Bill. And further Mr. Kenyon decided in this case not only that the Drawer would not be liable on his promise, but that in case he pays the money

Lex Mercatoria. Bills of Exchange & Promy. Notes.

he may recover it back, because he would pay it under a misapprehension of the Law. Chitty *sup.*

In case of an acceptance originally conditional want of notice is cured by a performance of the condition at any time before the day of payment - for then the acceptance becomes absolute, & then no notice is necessary. Chitty, 101. 80. 81.

Sta. 212. *Comp.* 571. 18. 56. 182.

There is a species of acceptance which I have not fully explained called an acceptance *Supra protest*. I shall now consider it.

When a Foreign Bill is protested for non acceptance, it may be accepted *Supra protest*, and the Drawer himself, may thus accept. y^e bill for the honor of the Drawer or of any Indorser, as he has refused acceptance according to the tenor of the Bill. The reason of his acceptance for the honor will be explained hereafter. I will barely observe that, when he accepts *Supra protest* for the honor &c. he does not do it on the ground of any liability, but as a stranger, merely. *Bowers Plac.* 33. 4 & 334. *Ryd* 152 to 156. Chitty, 23 = 103. 122. 163. 180. 209.

This is frequently done by the Drawer himself when a Bill is drawn on account of a third person, & the Drawer is unwilling to accept on account of this 3^d person, but is willing to accept on account of the Drawer or son Indorser. Thus if A draws a Bill in favor of J. P. payable

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

on account of B. Now if the Drawee accepts this bill according to its tenor & has no assents of the Drawer, his only remedy is vs. B. and he may be unwilling to accept on B's account - for he may not be responsible - but still the Drawee may be willing to accept for A. He may therefore have the Bill protested for non acceptance according to its tenor & still accept it for the honor of the Drawer. What he thus pays will not go to the account of B. but to the account of A. for whose honor he accepted it. Ky 152. Bowers 456. 1 S.R. 269. 1 Poult. 139.

So in common cases, if the Drawee is unwilling to accept on the Drawers account, yet he may be willing to accept for an Indorser, & in this case he immediately sends the protest to the Holder, as when he accepts for the honor of the Drawer, he must give notice to the Drawer. Bowers P. 33. 4. Chit. 103.

This mode of acceptance ^{of the Drawer} has this important consequence - that it operates to rebut the presumption arising from a simple acceptance that it has effects of the Drawers in his hands. As suppose A draws upon B. Now B says I owe A nothing, but still I am willing to advance money for him, for he is responsible. But I will not accept his Bill according to its tenor for if I do I thereby raise an implication that I am indebted to him - or that he has effects in my hands & the ones probandi in such case will be upon myself. I will therefore refuse acceptance according to the tenor of the bill, & accept it upon protest for A's honor. Chit. 204. 210. Bowers 455. Ky 156.

Lex Mercatoria. Bills of Exchange & Notes.

The effect of such acceptance is to give the acceptor a right of indemnity vs the Party for whose honor he accepts, or vs all the parties prior to that one. Whereas a simple acceptance according to the tenor of the Bill, can never give anything more than this right vs the Drawer or the person on whose account the Bill was drawn. And tho it does thus the presumption is that he is indebted to the Drawer to the amount of the Bill and that if he pays it it will only be an offset in his account.

So an acceptance *Supra protest* is followed by important results. e.g. Suppose there is no Indorser as yet and the original Payee is the Holder & the Bill is accepted *supra protest*. Now the acceptors indemnity is vs the Drawer, and he may charge him with so much money. And by acceptance *Supra protest* he rebuts the presumption that he (the acceptor) is indebted to the Drawer, & the onus probandi is not upon himself.

But farther, Suppose the Holder is an indorser - now there are two persons. The Drawer accepts *Supra protest* for the honor of the Indorser. Now by accepting for the honor of the Indorser, the acceptor may claim the amount of him (y^e Indorser) and also of the Drawer, for the Indorser could have remedy vs the Drawer & the acceptor must of course have the same remedy. But he cannot have a remedy vs any subsequent party.

Again there are two Indorsers. Suppose

Lex Mercatoria. Bills of Exch. Promy. Sales.

The Drawee accepts *Supra* protest for the honor of the 2^d Indorser. Now he can compel this 2^d Indorser to pay the money back - but this is not all. For he has a remedy vs the first Indorser. for the first is liable to the second Indorser. And again if the first & second Indorsers are liable to the acceptor so also is the Drawee, for he the Drawee is liable to both or to either of the Indorsers.

But if after this acceptance, a third Indorser becomes a holder, the acceptor can not claim of him, the third Indorser. He can only claim of those of whom this person for whose honor he accepted might have claimed. This right is this, first he has a right vs the party for whose honor he accepted, and as he comes in his place, he has 2^d a claim on all, who were liable to the person for whose honor he accepted the bill. but his claim does not extend to any subsequent Party. *Ky 103.5. Bowers 458. 1st R. 269.*

March 16th 1810. Sect. 8th

I further observe upon this subject, that if the Drawee refuses to accept the Bill at all, and other person may accept it for the honor of the Drawee or any Indorser. *Bowers pl. 38. Chitt. 129. Ky 103. 1st R. 104.*

But an acceptance for the honor of the Bill is the same as an acceptance for the honor of the Drawee, as well as in that case, is not an acceptance for & honor of an Indorser but for & honor of Drawee only. *Chitt. Ky 103.*

Lex Mercatoria. Bills of Exchange. 800.

And a Bill previously accepted *supra* protest for the honor of one party by one person, may afterwards be accepted by another person for the honor of any other party. Thus if the Drawer accepts for the honor of the Drawer, another person may accept for the honor of an Indorser. Bours, p. 42.

It has been said that it seems incorrect that the holder is bound to receive an acceptance *supra* protest when offered by a substantial or responsible person. But this is not Law, for it has since been decided, that the holder is not bound to receive such acceptance at all. If A draws a bill on B in favor of C, now C expects B will accept - he is a responsible person & he is willing to rely on him. But B refuses acceptance, and D is willing to accept the Bill *supra* protest for the honor of A. Now C the Payee would never have received the bill, unless he had expected the Drawer would have accepted it, or at least, if he had supposed a stranger would compel him to receive an acceptance *supra* protest. It sounds harsh on principle to say that the holder should be bound to receive an acceptance by a stranger merely because he is a responsible person. Bours, p. 27. 28. 12 Mod 410. Kip 155.

If after an acceptance *supra* protest by a 3^d person, the Drawer himself should become willing to accept, the acceptor *supra* protest may with consent of the holder permit it; but not otherwise. for this acceptance is as irrevocable as

Lex Mercatoria. Bills of Exch.^e & Promiss. Notes.

any other acceptance, and the acceptor *Supra* protest having made himself liable, he cannot discharge himself without consent of the holder. *Bowes* 457. *Kip* 154.

It is said the holder should have the Bill protested before he receives the acceptance *Supra* protest for otherwise it is said the Drawer might allege that the acceptor was not the person on whom the Bill was drawn. But I apprehend this holds only as to Foreign Bills of Exchange, for it is unnecessary to protest an Inland Bill of Exch.^e for the purpose of creating a liability. it is a Statute requisite made to entitle the party to a recovery of interest & damages & costs. *Chitty* 105.

The mode of an acceptance *Supra* protest is this. the party appears with witnesses before a Notary Public & declares that he accepts the Bill for the honor of the Drawer or Indorsee, & that he will pay the same according to its tenor. The usual form is to name him for whose honor he accepts it. But it seems the word "accepts" is sufficient, without any thing more. *Kip* 153. *Chitty* 105.

An acceptance *Supra* protest is however as binding on the acceptor as if there was no protest. Its being *Supra* protest does not affect the liability of the acceptor. He is liable, at any rate, to the holder, & the subsequent parties. It varies his rights as between him & ^{on his part} but not his liability. The reason of this rule has been sufficiently illustrated. *Bowes* pl. 35. 45. *Stanger* 575. 12. *Mas* 410. *Com* 276. 315 *Cur* 1672. 1674.

Lex Mercatoria. Bills of Exchange. Promy. Notes.

If one accepts for the honor of the bill, which is in effect an acceptance for the honor of the Drawer, he is liable to all the indorsers as well as to the holder. He is liable to all parties subsequent to the Drawer, — for as to all subsequent parties he assumed the liability which the Drawer by reason of the protest was subject to. But he is not liable to the Drawer. 185p B 110. Bours 457. KyD 153.

If one accepts for the honor of a particular Indorser he is liable to all the subsequent Indorsers, but not to that indorser for whose honor he accepts, nor to a prior Indorser, nor to the Drawer. For the extent of his liability is no greater, than that of the party for whose honor he accepts. Now the 2^d Indorser is not liable to the first, nor the first to the Drawer — but the Drawer is liable to the first Indorser & the first Indorser to the second. Of course he has the same rights as the prior parties as the person had for whose honor he accepts. Bours 457. KyD 153. Chitty 105.

On the other hand, as to those parties to whom the acceptor *supra* protest is not liable, he has a remedy or right of indemnity as vs those parties for whose honor he accepts, and all prior parties. If then he sustains any damage, as if he is obliged to pay the bill, he may recover of the party for whose honor he accepts & also of all prior parties. If he accepts for the honor of the Drawer, he has a remedy vs the Drawer only: if

L. x. Mercatoria. Bills of Exchange & Money. Folio.

for the honor of an Indorser, is the Indorser & draw-
er & if he accepts for the honor of a subsequent In-
dorsee he has a remedy vs him & all prior Indors-
ers & the drawer. See 1st pl. 47. 1st ed. 209. 1st ed. 139.
1st ed. 113. 1st ed. 155.

And here I will make an observation
which (I think) will more definitively & simply
explain his character & liability, than all the
rules hitherto laid down on the subject - and that
is this that an acceptor, *supra* protest, is, as to the
party for whose honor he accepts & as to all y^e pri-
or parties in the character of an Indorser. He ulti-
mately becomes the holder of the Bill - i.e. upon the
supposition that he pays it, & the presumption al-
ways is that he will pay it. This is obvious if
you consider the structure & effect of the transaction.
A Bill is drawn upon A. payable to B. and B. indor-
ses it to C. and C. offers it to A for acceptance, and
A refuses - B. says I will accept the Bill for the
honor of B. the Indorser & B. pays the money upon it.
Now B. was a stranger, but after he pays the a-
mount to the Indorser, he becomes virtually noth-
ing more or less than a purchaser of that Bill.
You observe B. does not accept it on account of
any liability, but as a mere stranger. He pays
the money to the Indorser, he is then entitled to the
Bill & becomes the holder of it. He is in effect
precisely the same, as if instead of accepting the

Lex Mercatoria. (Bills of Exchange & Promissory Notes.)

Bill. *Supra* protest, he had offered to purchase the Bill & had paid the drawer the money for it.
1 Esp. R. 113.

Transfer & Negotiation of Bills.

Bills which are negotiable at all, are in their nature negotiable in infinitum. This is the case with Bills of Exchange properly so called and with Bankers checks. It was formerly held that bills payable to Bearer were not so negotiable - but it has been long since settled otherwise. See 211.2 B.C. 467. 3 Bur 1517. 1527. For the former rule see *supra* see 3 Esp. 299. 3 All. 125. 5 Ry. 139.

When a Bill is not negotiable, a transfer will operate vs. the party making it, as if it were negotiable; i.e. it will subject him to the amount of the bill if the person to whom he transfers it cannot recover of the ^{drawer} person on whom drawn. For you recollect that choses in action tho at C. & not negotiable were so far transferable as that the assignee tho he can maintain no action in his own name vs. the original party, may have an action on the implied covenant wth assignor. Thus if a Promissory Note vs. A. which is not negotiable is transferred by B. to C. now there is an implied covenant on the part of B. that A. the promisor will pay it, and if he does not the assignee may have an action on this implied Cov^t of the assignor. 3 All. 125. - 127. 133. Holt 117. Bur. 1226. & B.C. 442.

Lex Mercatoria. Bills of Exchange from p. 501.

And whether a Bill is negotiable or not, is a Question of Law, for the Ct. to determine.

It is said indeed as to new cases, i.e. where the doctrine is not settled, that the Custom of the ^{may be inquired} ~~country~~ ^{into}, & to ascertain this, those eminent in the business may be admitted to testify. This doctrine appears confused in the Books. There is no doubt, but a merchant may be examined to tell what he knows of a particular custom & used by merchants. But he is introduced in this case, the same way that a Book written upon that Subject would be introduced, I trust - or for the same purpose that we would consult a Dictionary. I trust he is ^{not} ~~not~~ ^{introduced} for the purpose of enabling the Jury to find the particular custom & thereby enable the Court to make an application of the Law to that finding - but to give information to the Judges. The rule is absurd considered in any other sense - for otherwise the merchant is testifying to what the Law is. - Since it is always so laid down in the Books. 2 Bur 1216. 1 P.C. 16. 295. Doug 653. Watson's Law Part. 253 to 257.

It is a general rule that a valid transfer can be made only by the Payee or other person having the legal interest in the Bill. Hence an indorsement by one not having the legal interest does not transfer the interest to another. If a Bill is drawn payable to A B. and C. indorses it to D. then D. is a Stranger & cannot transfer the interest to E. for he himself has none. And if a

Lex Mercatoria. (Bills of Exchange) (Pamph. Notes.)

bill is made payable to A. B. and another person by the name of A. B. should indorse it, this does not transfer the interest to the indorser. for the Indorser himself is a Stranger & has no interest. 4 T. R. 28. 1 H. Bl. 607.

But if a Stranger will voluntarily to indorse the Bill he will himself be liable, the such indorsement will not make the Prior Parties liable. The volunteer has no title to the bill, but by transferring it, he warrants the payment of it to the person to whom he makes the transfer. Chitty, 171. 122.

When a Bill is made payable to bearer it may be transferred without indorsement by mere manual delivery. There is no need of indorsement, for by the terms of the bill the interest will pass without it. And in this case, if it is transferred by a person, who is not the owner of it, such transfer will not subject the Prior Parties, provided the person to whom it is transferred knows that the person transferring was not the owner. But if he was ignorant of this fact he can recover vs prior parties. for here is a bill payable to bearer and a bearer has passed it to him - and were it not that he was allowed to recover vs prior parties, the credit of these bills would be impaired & their circulation prevented.

The rule holds the same as to a Bill payable to order which has been indorsed in Blank by the Payer. There is no need of an indorsement in such case, it will pass by manual delivery; for any holder has a right to fill up the blank with his

Lex Mercatoria. Bills of Exchange & Promissory Notes.

own name. Suppose then a Bill is payable to A. or order, and A. endorses it blank. Now this bill may be transferred by manual delivery, for any person into whose hands it may come may fill up this blank indorsement with his own name. The reason why he has a right so to fill it up is, that the person who thus puts his name upon the bill holds out a credit to any person who will receive it, as I before remarked the holder may fill up the blank by inserting his own name. So also the bill may run the gauntlet over the world by manual delivery & the ultimate holder of it resort to the prior Parties by filling up &c. *ut supra*. 3 Bur 1516. 166. 452. 1836. 16. 485. Doug 611 or 633. 2. Kay. 738. Chitty 9. 51. 100. 121. 122. 201. 209. Kyd 102.

If a *Feme sole* being Payee or holder marries, the right of transfer belongs to the Husband. She has become legally incapable of indorsing it. *Ira*. 516. 3 Wils 53. 10 Mod 246.

If the Payee or holder becomes a bankrupt, the right of transfer generally vests in the assignees, & this right as a general rule, vests from the time of the act of Bankruptcy committed. There are some exceptions to this, introduced by English Statutes. *Baunis* 469. 2 H. Bl 335. Kyd 107.

If however in such case the holder should have delivered the Bill to another before his Bankruptcy, but had for some cause omitted or neglected to indorse it - he may indorse it after Bankruptcy.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

For this is only completing an act which was begun before Bankruptcy - and which in justice should be performed. Wak 10.50.

On the Death of the holder the right of transfer devolves on his personal representatives. 3 Wils 1. 2 Stra 12.60. 2 Burr 1225. 1 T. R 487. 176. B. 622. Chitty 111. 112. -

If a Bill is made or transferred to two or more the interest in the Bill & right of transfer is in both or all of them collectively & not in one alone. But this interest or right, if they are all Partners, may be transferred by the act of one, because one of two partners has a right to act for both. But the rule supposes they are not Partners. This is not like the case of 2 persons drawing a bill payable to their own order, for here they are ipso facto partners. They have by their own act made themselves jointly liable - & therefore the act of one in the name of both will bind both. Ky 10.6. Doug 653.

If a Bill is payable to A. for the use of B. the right of transfer is in A. because he has the legal title & B. the equitable interest. Carth 5. - Bond 307. 309. 2 Show 509.

When a Bill is indorsed to an Infant, & by him indorsed to another, I find no judicial authority, whether the latter may recover of the former parties. Make this a Moot Question. I will reserve my opinion till you discuss it.

Lex Mercatoria. Bills of Exch. & Promy. Notes.

Bills are usually transferred after acceptance & before payment. This is not universally the case, for it may be transferred before acceptance & after the time of payment.

And a Bill (saving a solcism in language) may be transferred before it is made - or in other words a transfer of an intended Bill, may be made before the bill itself is made. Thus if A. endorses his name on a paper & delivers it to B. Now B. has a right to procure a bill (written on the opposite side) from that on which the name of is endorsed ^{from} ~~from~~ ^{from} ~~from~~ A. & payable to A. Now the bill is endorsed by the (Payee to B. and such transfer is good, tho' in reality made before the bill is drawn. Doug 4.96. u 514. 176 B.C. 313. 316 = 319. Chittys 112. 113. Kyd 89.

A valid transfer may be made after 4th time appointed for payment. However as such transaction affords grounds of suspicion the holder takes 4th bill subject to all the equity to which it was subject in the hands of the prior parties provided he had knowledge of such equity - and according to some opinions whether he had knowledge or not.

3 B. R. 83. 7 B. 423. 1 Wils 230. 3 B. 1516. 2 Bay 575.

Still however the party who transfers the note after it becomes payable cannot avail himself of such grounds of suspicion as vs. a 3^d person who became a bona fide holder for a valuable consideration the ~~vs~~ a prior party ~~to~~ may. For the Defend. himself made the irregular transfer.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

and he has no ground to complain that he has not a right to take advantage of such ground of suspicion. [This ground of suspicion is, (that by a transfer after the day of payt.) that the transfer was *unfair* - see ante. Page] He cannot operate in his favor. There may indeed be some ground of suspicion that he had received the value of the bill, or that he had forfeited all right to recover upon it. Now the prior parties may take advantage of this, but he (the person transferring & Defend in this case) cannot. The rule is laid down, *ut supra* that he can't avail himself of the ground of suspicion as *vs.* a 3^d person who becomes a bona fide holder for a valuable consideration - but I should think also the party transferring could not make the objection *vs.* the immediate transferee. Suppose I am the holder of a Bill & after the time of payment. I endorse it to you. Now if there is no fraud between you & me, nothing which will deprive you of your right of action. I can see no reason why you should not stand upon the same footing, as a subsequent bona fide holder for a val. consideration. 7 T.R. 423. 430.

But an indorsement after payment binds no other party than the person making it. This rule I trust you suppose the day of payment has passed. For if the Bill is transferred before the time of payment, tho it may have secretly been paid before the time, it affords no ground of suspicion. Thus after payment by the drawer of the bill the holder endorsed it over, it was determined that the subsequent holder could not recover of the acceptor any more than *vs.* the drawer. 1 Stark. 46. 4 T.R. 470. 1 H. Bl. 39.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

But a bill paid in part may well be in-
dorsed over to the residue. 2. Bay. 360. Smith 466. 12. Mod.
213. 1. Talk 65. 2. Wils 201.

March 17. 1813. Sec. C. yet

In treating of the negotiability of Bills & Notes
may endeavour to explain the nature of a transfer
by which it is made. There are certain rules rela-
tive to the mode of transferring Bills.

. For this mode is governed in all cases, accord-
ing to the legal effect of the bill, it is not governed of
course by the terms of it, tho' generally the terms and
the legal effect are the same. That they are not al-
ways the same is manifest from the case of a fictitious
payee. A bill such a Bill imports to be payable to order,
but it cannot be indorsed, for by the supposition
there is no person in esse who can indorse it. It must
be payable to bearer, if payable at all. The terms
& the legal effect of such bill are entirely different.
176. 156. 690.

A Bill payable to C. F. or bearer, or to bear-
er generally, i.e. without specifying any particular
Payee, may always be transferred by mere manual
delivery without indorsement. An indorsement on
such a Bill is no more requisite than an indorse-
ment on a Bill payable to order, & made by a stran-
ger. And even if an individual is named, as if it
is drawn payable to A or bearer an indorsement
is unnecessary. It is negotiable by manual delivery.

The rule is the same as to a bill payable

Lex Mercatoria. Bills of Exchange & Promy. Notes.

to "To order" after it has endorsed in blank, but not before. In the first instance, a bill thus payable can be transferred by indorsement only - but if it is endorsed blank it is transferable by delivery, because the ultimate holder may fill up the blank with his own name & thereby become the immediate indorser. 1 Dougl. 452. 2 L. Ray. 442. Hall 115. 1 Stra 507. Doug 633 & 611. 2 B. & C. 225. 3 B. & C. 1516. 1 B. & C. 485.

The original distinction as to the mode of transfer between a Bill payable to order & one payable to bearer is, that the former cannot be transferred in the first instance without indorsement, but being endorsed in blank it may be transferred by manual delivery. On the other hand a bill payable to bearer may be originally transferred by delivery & without indorsement. 1 B. & C. 606. 1855 B. 180.

These mercantile contracts are all liberal & expounded, and as no formal words are necessary in the creation of a bill, so no formal words are necessary to make a valid indorsement. Nothing more is necessary than for the Payee to write his name on the Back & this is called a blank indorsement. 2 B. & C. 408. 2 Stra 1103. 1 B. & C. 126. 128. 130. 2 L. Ray. 440. Com. B. 311.

Indeed it was formerly contended that any written entry on the back amounted to an indorsement unless it expressed a refusal. But this is not so now. Thus it was contended that the Payee writing the R^o of the bill on the back was a good indorsement. 3 B. & C. 577.

The indorsement may be in either of

Tex. Mercatoria. Bills of Exchange & Promiss. Notes.

There is another division in Blank & in Full, as it may be Restrictive. This division is illogical, for in strictness there are but 2 forms of endorsing a Bill, viz. in blank or in full, and the latter is divisible into, Endorsement in full restrictive & endorsement in full not restrictive. These different forms are so divided in the Books & I shall therefore pursue the same division. and 1st. As to a Blank Endorsement.

A Blank endorsement is nothing more than the writing of the Payee's name on the back of a bill. This is the most common mode, - it facilitates the currency of the bill & gives it a more indefinite negotiation, as when thus made the bill may be transferred by mere delivery & the ultimate holder can substitute himself the immediate Endorser by filling the blank with his own name. Kyd 89. Chittag 117.

It is to be observed however that an endorsement in blank does not per se transfer the interest but merely gives the holder a power of constituting himself the Endorser or assignee by filling it up to himself. Thus if a Bill is payable to A. and A. puts his name in blank on the back this is not per se evidence that the holder has any interest in the bill - nor can he recover upon it, until it is filled up. The usual form is to fill it up with these words "Pay the contents to A.B."

1 Salk 126. 128. 130. 12 Mod 192. 244. 3 Ray 443. 2 Stra. 1103. Com Ry. 311. 3. & P 275.

An action may be commenced by the holder

Sex. Mercatoria. Bills of Exch. & Promy. Notes.

before the endorsement is filled up. It is only necessary that it be done when it is delivered as evidence of his title to the jury. He may do it on Trial, but it must be done before a verdict can be found in his favor for without it, there is no evidence of his title & interest in the bill.

A Blank endorsement while it remains blank is ambiguous in its effects - or rather it has no certain effect. It enables the holder to fill it up with his own name as Indorser - or he may fill it up with a power of Attorney to himself - or he may fill it up with a receipt. He has a right to fill it up with any thing which comports with the nature of the bill. If he fills it up with an order of payment to himself, he constitutes himself the Indorser - if he fills it up with a power of Attorney to himself he thereby constitutes himself the Indorser's agent to collect &c. same &c. If he fills it up with a receipt he constitutes himself the agent of the Endorser and by the receipt it appears he has paid the money over to the Indorser. But for the purpose of entitling himself to a recovery on the bill he should fill up the blank with an order of payment to himself. Kyd 95. 96. 1 Show 163. S. Ray 87. Salk 125. 113c. R 297.

It follows from the last rule that while the endorsement remains blank an action may be brought in the name of the endorser. The holder may give the bill back to the endorser, or let him buy the

Lex Mercatoria. Bills of Exchange (Promy). Notes.

the action on the holder may bring it in the name of the indorser, and if he chooses he may write over the name a power of attorney to show how he has the right. But this is unnecessary. The endorsement per se does not show that the indorser has parted with his right & therefore the action may be brought in his name. But after this endorsement is filled up with a direction to pay it to another no action can be brought in the name of the Indorser, for the bill when produced in evidence shows he has no interest in it. Same auth. ut supra & 2^d Ray^d. 871. 12 Mod. 193. 244. 2 Stra 1103. Salk 125. 128. 130.

And in pursuance of this rule it has been determined that when the holder lost the Bill wh. was endorsed in blank, & an action of Trover was brought against the finder in the name of the Endorser, that the holder was a competent witness. Hy^d 46. 2^d Ray^d. 871. Salk 130. I do not (says Gould) discover on what principle this could be done, if it should appear in evidence that the holder had really purchased the bill, for in such case he would have a direct interest in the event of the suit. But upon the supposition that no evidence of his interest appears except what is derived from the circumstance of the Bills being endorsed in blank, he is a competent witness.

I have before observed that a blank endorsement by Payee makes the bill transferable by manual delivery, because any holder may

Lex Mercatoria. (Bills of Exchange & Promy. Notes.)

fill up the blank with his own name. I would further observe, that the negotiability of the bill, the endorsement remaining in blank, cannot be restrained by any subsequent endorsement in full, transferring the interest. . . e.g. Suppose a bill is made payable to A. or order, & he endorses it in blank to B and B endorses it in the usual form "Pay the contents to C." Now this bill may still be negotiated altho the words "or order" are omitted, & no other operations words of transfer are inserted. It may be negotiated I say, because the holder may strike out the intermediate endorsement in full - and fill up the blank endorsement with his own name & thus constitute himself the immediate indorsee. Holl 96. 1 Esp R 181. 2. 406. 210. Chitty 118. 188. 201. (Peak R. 225.

And on the other hand, if the Payee makes an endorsement in full, as e.g. "Pay the contents to C or order," still a blank endorsement by the indorsee will make it negotiable by mere delivery. It is true, after such endorsement in full it cannot be further negotiated but by an endorsement by the indorsee. But by his endorsing it in blank it may be negotiated ad infinitum. for now there will be a regular continued chain of title from the Payee to the holder whoever he may be. (Esp R 182.

But a bill payable to order, is not negotiable by mere delivery, unless it is endorsed in blank by the Payee or his indorsee. It is not originally transferable by delivery, unless it is endorsed

Lex Mercatoria. Bills of Exchange & Promy. Notes.

in blank by the Payee - for if it is payable to A. and B. endorses it. this does not transfer the interest, for B. is a Stranger.

When a Bill is payable to order it is not negotiable at all without an endorsement of some kind by the Payee. If he endorses in blank it becomes transferable by mere delivery - but it cannot become negotiable until an endorsement either in blank or in full is made by the Payee. Mod. 87. Doug 611 or 633 - 617 or 639. 1 W. 152. 606.

2^d of endorsement in full. An endorsement in full is one which expresses the person to whom the endorsement is made. As e.g. "Pay the contents to A or order". An endorsement in full of this kind contains in itself a transfer of the interest to the person named. Chitty 118. Ryd 89. Polhier pl. 22 to 24.

An endorsement in full, makes the bill further negotiable, in the first instance, only by the endorser's endorsement. For as on a bill payable to A. or order there can be no negotiation but by A. - so an endorsement to B. or order, B. must transfer it. For so long as the successive endorsements continue to be in full, there can be no transfer without an endorsement until some endorser endorses it in blank, & then it is transferable by mere delivery. 1 Esp. 182 note 2.

The negotiability of a bill cannot be restricted even by the Payee himself & of course not by a special endorser but by express words of restriction.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

The mere omission of the operative words of transfer does not restrain its negotiability. Thus if a bill is payable to A. or order, & he endorses it to B. in full, without inserting the words "or order" or any other operative words of transfer, yet it continues to be negotiable. *Com. 16. 311. 100. R. 295. 2 Bur 1216. Sha. 557. Doug 617. 637.*

And if the Payer endorses in blank and yet endorsement runs across so, its negotiability can in no way be restricted by any subsequent endorsement provided it transfers the interest. This rule, & the reason of it, & the authorities to it have been before given. (see 2, pages back at 7: 60. 7. 7.)

3^d. Of restrictive endorsements. An restrictive endorsement is one, containing express words restraining the negotiability of the bill. If then the Payer endorse thus "Pay the contents to B. only," the endorsement is restrictive and B. cannot negotiate the bill. Or suppose the endorsement is "Pay the contents to B. for my use," B. cannot endorse this bill for it appears he has no title to it. The effect of such endorsement is to stop the further negotiability & currency of the bill. *Doug 617 or 637. Polkin 168. Chitty 119. 120.*

The Payer or Endorser having the absolute property may limit the payment to whom he pleases & thus destroy the further negotiability of the bill. He is as formerly considered otherwise. It was once thought, that if the bill was originally negotiable, its negotiability could never be restricted.

Lex Mercatoria. Bills of Exch. & Promy. Notes.

But this is not now Law. Thus in the *E. & G. supra.*
"Pay the contents to B. for my use." B. cannot endorse y.
Hence by the face of the endorsement it appears he
has no interest. Suppose the payee had made a blank
endorsement, & then his transferee makes an endor-
sement thus "Pay the contents to C. to my use." Now C.
cannot by transferring to D. enable D. to fill up the
blank endorsement, because C. the 2^d Indorsee ap-
pears to have no interest & therefore he can transfer
none. He appears a mere agent by the terms of
B's endorsement. 2 Burr 1227. 1 B. & C. 10299. 1 Atk 249. 1 Thom 160.

But I conclude upon principle that if y.
endorsement, the restricted, transfers the interest, the
last rule will not hold. I form my opinion here from
analogy. I have no authorities to this point. Thus
suppose a bill is made payable to A. or order, &
he endorses it in blank to B. and B. makes a restrictive
endorsement to C. as "pay off contents to C. only," & C. endor-
ses it to D. Now I conceive D. may erase the endorse-
ment restricting the payment to C. & fill up y. blank
endorsement to himself - for here C. the 2^d Indorsee has
the interest. He can show his title by the endorsement.
The reason of the last rule does not apply here
for in that case the indorsee had no interest he was
the mere agent of the endorser. whereas in this case
the 2^d indorsee has the interest, as is manifest from
the terms of y. endorsement.

A transfer it seems cannot be made after
acceptance for less than the amount due on the

Lex Mercatoria. Bills of Exchange & Promissory Notes.

Bill. If a transfer could be made of a moiety to A. & a moiety to B. on the same principle it might be divided into a thousand parts. and if such endorsements were valid, it would subject the acceptor to two, & as the case might be to an indefinite number of actions. If it is so endorsed, the acceptor is not bound by his acceptances & the holder, or either one of the parties who have an interest in the bill, can never make a claim upon him. 3 Ry. 360. Lamb. 466. Bath 65. 12 Mod 210.

I conclude however, that I have no authorities, that an endorsement for part of the amount, after acceptance would bind the endorser. The reason applying to discharge the acceptor does not apply here. There the rule was to protect the acceptor from a multiplicity of actions, which would otherwise arise in consequence of a division of the interest in the bill, and to which division he never consented. but in the latter case the endorser is the procuring cause, & by dividing the interest he will, I trust, make himself liable, & the Law will not be solicitous to protect him.

And with respect to the liability of the acceptor, if a bill is endorsed one half to A & the other to B. & he accepts it in this form, he will be bound by such acceptances. - for by accepting he assents to such divided interest specified by the endorsement, and this I think justifies the supposition above that an endorser is bound for a divided endorsement. For surely if the acceptor is bound by his acceptance

Lex Mercatoria. Bills of Exchange & Promy. Notes.

when the interest is divided, the endorser making it, *a fortiori* is bound. *Beauv. 266.*

It seems then from these last rules, that by such endorsement of part to A & part to B: that the drawer can never be subjected except in the unusual case of the endorsement made before the Bill is drawn. *2 Ray. 360. Salk 65. Carth. 406.*

And as the acceptor who accepts before endorsement is not bound by an endorsement of a divided interest, so neither is he bound by an endorsement of part to A tho the other part is not endorsed at all, & for the same reason; he would be liable at any rate to two actions. But tho the acceptor cannot be made liable by such endorsement - yet after part is paid, the acceptor will be bound by an endorsement of the residue, for the whole is to be paid. Then he does not incur a two fold liability - his liability is single, & it is not material whether it extends to the whole note, it is sufficient if it extends to what is due. *2 Wils. 262 2 Ray. 360. Salk 65.*

To complete the transfer the bill is to be delivered to the transferee. This rule is applicable to all written contracts. *Co Litt. 61. 115. 121.*

Lex Mercatoria. Bills, Exch. & Prom. Notes.

March 18. 1813. Section 10th.

Yesterday I explained the mode in which trans-
ference is made. I shall now treat,

Of the operation of a Transfer.

A transfer of a Bill by endorsement is sim-
ilar in legal effect to the making of a new Bill; & the
Endorser is in almost every respect as a new Drawer
or the original Drawee. This will appear mani-
fest if you consider the structure. The original
Bill is an order to pay the money to the Payee -
the endorsement is an order to pay it to the indorsee.
So they are almost precisely the same. *Stu. 133. 1 Bar*
674. 3 Salk 68. 2 Show 441. 495. 501.

And a Promissory Note when indorsed bears
a strong analogy to a Bill of Exchange. Indeed the
analogy is very strict. Before endorsement it does
not resemble a Bill of Exch. at all. It is a prom-
ise by A. to pay money to B. Whereas a Bill of Exch.
is an order drawn by A upon B. requesting him to
pay the money to B. When the Promissory Note is thus
indorsed, the endorsement is an order from one to
another to pay the contents to a third person. The In-
dorse is in the nature of a Drawer. The Promissory
character corresponds with that of the Drawer of
a Bill. The Indorser of a Promissory Note is as the
Payee of a Bill. And on this principle of analogy, it
has been determined that a Promissory Note thus
indorsed may be declared on or pleaded as a Bill
of Exchange. The indorser being virtually the drawer

Lex Mercatoria. Bills of Exche. & Promy. Notes.

Drawer, the Promissor virtually the Drawee, and the indorser virtually the Payee. 4 T.R. 149. 6 Mod 29. 11 Bur 676. 2 Rop. 743. 1 Salk 132. 103.

Hence also the obligation to which the endorsement of a Promissory Note, subject, the indorser is put of the indorsee is the same as that to which the drawing of a bill, subject, the Drawer is put in favor of the Payee. A transfer by bare delivery is made for an antecedent debt, or for a debt accruing at the time for a valuable consideration (as for goods delivered at the time) subject, the party making it in favor of his immediate assignee to an obligation similar to that created by endorsement. If then a Bill is transferable by bare delivery (as we have already seen it sometimes may be) and it is delivered over for an antecedent debt due to the transferee, or for one created in his favor at the time, the party transferring it is under the same obligation to him, as if he had made the transfer by endorsement. 7 T.R. 64. 6 T.R. 52. 3 Rop. 428. 12 Mod 244. 408. 521.

There was formerly a distinction taken on this subject, which I will not take time here to explain as it has long since exploded & is not true. For y^e distincⁿ. See Holt 248. 9. Salk 124. 3 Salk 68.

The rule above does not obtain, if it is expressly agreed between the parties at the time, that the assignee shall take the Bill & himself assume y^e risk - for he agrees to take it thus. 7 T.R. 65. 6. Holt 121. Chitly 13. 124. If then a bill is transferred by bare

Lxx. Mercatoria. Bills of Exch. (from y. Notes.)

delivery (tho assignee does not assume y. risk at ant)
& the Drawer fails to pay it. the assignee may recover
of the assignor on the consideration of the transfer;
i.e. if the debt was created by the sale of Goods, he may
bring an action for the Goods sold or he may sue for
the antecedent debt if that was the consideration of
the transfer. He cannot recover of the Party trans-
ferring on the bill - (as being a Party to y. bill) for by
the supposition his name is not on the Bill, & he is
not a Party. But he may recover upon the antec-
edent or new created debt. But I repeat he cannot
recover on the Bill, for no person can be a party
to a Bill unless his name appears upon it, except
the Holder. 7 T. R. 65. 6. 3 B. 177. 2 Ray. 928. Kyd 90. 91.

And for the same reason (viz that a Party
transferring by delivery ceases to be a party to y. bill)
he cannot be liable to a subsequent assignee -
He is liable only to his immediate assignee - for not
being a Party to the Bill a subsequent assignee
cannot maintain an action vs him as a party;
and as by the supposition he does not transfer the
Bill to a subsequent Assignee 2 Ray. 928. Carth 270.
3 Bur 1525. 1 Show 130. 20 B. 61. Chitty 123.

And further - there is still another excep-
tion to the general rule, i.e. the Assignor transferring
by bare delivery, is not liable to the Assignee, if y.
transfer was (by y. discount, by which is meant by way
of sale. The sale of a Bill then is like the sale of any
other article. & you state the true ground of distinc-
tion

Lex Mercatoria. (Of Bills of Exch. & Prom. Notes.)

distinction to be this - that there is no ground of action at the time there is no debt on which an action can be maintained. Now if A. being indebted to B. transfers a bill to him by bare delivery - & it is not accepted he may have an action for the antecedent debt, or if the consideration of the transfer was goods, he may have an action for those goods. But in case of a sale there is no debt antecedent - or contemporaneous - or simultaneous (law-bankers) - there is no indebtedness on which the action can be maintained. The person taking a discount takes the risk of course unless there is a warranty. 3 T.R. 757. 1 Esp.R. 447. Ryd 90. 91.

When there are several parties liable on a Bill, the holder may pursue his remedy against one alone, or against each separately. Thus when the Bill is dishonoured, the holder may sue the drawer - or he may sue the Indorser - & all the Indorsers - But he cannot join them in one action. The contract of each is separate. And if in this case the holder pursues one to judgment & takes him in execution - this does not discharge the other parties - or if the holder after committing one to prison, voluntarily discharges him (from prison) this does not discharge the other parties - they are still liable - or if one who is taken (as e.g. the Drawer - whether committed to prison or not, becomes an absolute Bankrupt, or obtains an act of insolvency, this does not discharge the others. 2 B.C.R. 1235. 4 T.R. 185. 325. 2 R. 690. Tulk 574.

Lex Mercatoria. Bills of Exch. & Promy. Notes.

If the holder of a Bill, transferable by bare delivery loses it, & it comes into the hands of a bona fide holder who is ignorant of the fact, & who pays a valuable consideration for it, he may recover vs the (Prior) Parties. As between the finder & the loser undoubtedly the interest is in the loser, for the finder paid nothing for it & he could not recover. But see in case of a bona fide holder *et supra*. The rule is the same if the bill was stolen instead of lost - if the thief in such case transfers it to a bona fide holder, having no knowledge of the fact - he may recover upon it, tho the thief could not. 1 Bur 452.

3 Bur 1516. 2 Wms 738. 5 Taun 126. 7 T.R. 427. 3 Taun 71.

But if the holder in the case supposed received the bill after it had become due, he comes within the rules hitherto laid down, i.e. he is liable to the presumption which may be founded on the slightest circumstances, that he knew the Bill was lost or that the transfer was unfair - and according to some opinions he is liable to all 3: Equity to which the Bill in the hands of the thief or finder was liable, even without the aid of such presumption. This last opinion is not well founded I think nor fortified - but the former is undoubtedly true.

And if in either of these cases (when the bill is lost or stolen) the holder has not paid a good consideration, so that he could not recover, still if the Drawee not having notice of the loss &c. pays it to the holder he is protected in having made y^e payment.

Lex Mercatoria. (Bills of Exch. & Promiss. Notes.)

the same as if he had paid it to the real owner. For what means had he of knowing the Holder was not the true owner? When it was presented to him for payment, there is no reason that he should raise a question whether the person presenting was in fact the owner or not. & thus subject himself to a lawsuit. He is compelled to pay to the Holder when the bill is presented. 4 T.R. 28. 1 T.R. 507.

But if a lost Bill is paid to the holder out of the usual course of business, as before the day of payment, the Drawer it seems may be compelled to pay the amount over again to the true owner. Thus when a Bankers check was dated forward & presented & paid before it bore date, & it appeared that it was lost, it was held that the banker should pay it over again to the person who had lost it. 1 Esp. 16. 40. 181. Chitty, 13. 125. 150. 151.

The rule is the same if the Drawer pays it before it is due.

If a Bill transferable by indorsement only is transferred or negotiated by a forged indorsement the holder gains no interest in it whether he is the person who forged it or not. No subsequent holder can recover upon it. For though when a bill or indorsement is authentic, a holder who is ignorant of any fraud about it must recover, yet when a bill or indorsement is forged the holder shall not recover, for the holder must always assume the risk of its being genuine. For were it not so,

Lex Mercatoria. Bills of Exch. & Promy. Notes.

the Mercantile Law would be instrumental of much mischief - as thereby the person purporting to be the Drawer or Indorser would be made liable on an instrument which was not his act & deed?

If then one claiming money under a forged indorsement should receive the money of the acceptor the latter would be compelled to pay it over again to the true owner. 1 T.R. 607. 4 T.R. 28. Doug 617 or 637.

It is a rule of Public Mercantile Law that if the Drawer of a Foreign Bill, whether accepted or not, is lost or delivered to a wrong person, he must give his Promissory Note payable at y^e same time as that specified in the Bill, & for the same amount, - If he refuses to do this a protest for non acceptance or non payment may be made & after the original time of payment has elapsed, an action by the true owner may be maintained vs him. Beavis pl. 188. B. N. P. 271.

There is no such rule as the above, as to Inland Bills of Exch. They are governed here by the Mercantile Law of Eng^d as they are there. Chitby 127. 8.

If the Drawer absconds - i.e. I suppose after acceptance the holder may protest y^e bill for better security - & then he must give notice to the prior parties of the Drawers absconding. He may protest the bill I say for better security, & if that is refused he may protest it for
I conclude that the rule relates only to those cases, where the Drawer absconds after acceptance,

Lex. Mercatoria. Bills of Exchange. Promiss. Velas.

For it is a solecism to talk of protesting for better security, before acceptance, for till then he has given no security at all. 5. May, 79. Beaumont 22. 24. to 29.

This better security is to be given (when given at all) by a third person who engages under the Protest to be bound as principal for the payment.

Com. Di. title "Merchant" P. 8. - Whitty, 129.

I have thus far traced the bill of exchange from the act of drawing, to the acceptance, & through the transfers, & the various courses to be pursued by the holder or the drawee in case of refusal to accept. I shall now treat

Of Presentment for Payment.

On this point the general rule is that the holder must present the bill to the drawee for payment at the time fixed for payment - if such time is appointed in the Bill, & if not within a reasonable time. I have so often had occasion to mention what is a reasonable time, that a further explanation of it here is unnecessary.

I have further to observe that presentment for payment must be made whether the Bill has been accepted or not, & even if the drawee has refused to accept & notice of this, (i.e. of nonacceptance) has been sent to the Prior Parties, still it must be presented for payment; for the drawee may not have had a copy in his hands at the time of refusal, & therefore we have had sufficient reason for not complying with the request contained in the Bill; but he may now have funds in his possession, or

Lex Mercatoria. Bills Recd. & Prom. & Solis.

Since his refusal to accept he may have changed his mind & become willing to pay. 2 Bur 669. 7th R. 581. Ky 120. to 125. Salk 127. Stra 1087. 2 B.C.C. 470.

Of course if the holder does not present for payment as the rule requires, he loses all remedy vs the prior parties, same auth. & 1 Show 155. B.N.P. 182.

If the acceptor is dead at the time of payment presentment must be made to his Personal representatives if he has any, & if he has none, presentment is to be made at the acceptors house or last place of abode. Potkin p 146. Chitty 132. 136.

But a neglect to present for payment may be excused, as a neglect to present for acceptance may be. i.e. for the same causes which will excuse a neglect to present for acceptance. Thus if the drawer (acceptor) has no effects of the Drawers in his hands the holder need not present for payment. So if he has absconded.

The acceptor himself can never defend on the ground of delay, in presenting for payment, tho the prior parties may. Nor can the acceptor ever defend on the ground of indulgence (as a prolonged time) given to any of the prior parties, as Drawer, Indorser &c. for the acceptor is the party first liable, & it is no injury to him that he has not had notice of such indulgence. Besides it is always presumed that he is the party who ought to pay. The presumption is that he has effects of the Drawers in his hands. Long 235. or 247. 183 p 10. 46.

Lex Mercatoria. Bills of Exchange & Promy. Notes.

It has been said that an action will lie by the holder vs the acceptor himself without presentment for payment. for that he being the first party liable he is bound to seek the holder & not the holder to seek him. This is the rule of the C. L. in ordinary cases. For if I am bound in a bond to pay a certain sum of money, I must seek the obligee & pay the money at my peril & he is not bound to seek me. But this rule as applicable to the acceptor of a negotiable instrument is very questionable, & I think it is not defensible. For in such instruments transferrable from one to another the acceptor may not, & frequently cannot know who has the Bill. He may search y^e world over for y^e holder & not be able to find him even then. The subsequent receivers are often strangers to the prior holder as well as the acceptor. I am confident the rule of C. L. applying as to ordinary cases in action cannot apply in this case. I take the better opinion to be that the holder must present for payment & if he does not the acceptor is discharged. As to y^e 15th opinion see, 10 Mod 38. Baily 78. 108. Contra opin. see Stra. 222. n^y. Poth 140. 1 Sur 98.

In the case of Foreign Bills if the course of Exchange has altered between the time of drawing & y^e time of payment, the acceptor must pay at the rate of Exchange when it becomes payable. For if I should this day draw a Bill on London when to day Foreign Bills are at par & when the time of payment arrives they have depreciated 20 per cent. it is evident

Lex Merchant. Bills of Exch. & Promy. Notes.

that if the acceptor were obliged to pay at the rate of Exchange at the time when the Bill was drawn he would lose 20 percent. He must pay then at the rate of Exchange when the Bill falls due. Polk. 174. Chitty 133.

However the question whether the holder in ordinary cases is bound to present for payment may be put where the engagement of the acceptor is to pay on demand or after demand & the bill is not presented for payment the acceptor cannot be subjected. he may insist on the want of presentment for payment as a defence. This rule is well settled. 2 How 235. Chitty 134.

If the acceptor appoints payment to be made by another person, as at his Bankers Office, he & all the other parties may insist on presentment at that place - and if presentment is not there made they are prima facie discharged. Still if it is proved that such banker had no effects of the Acceptor in his hands, the rule does not operate. 2 Sha. 1195. 2 W. 14. 509.

This presentment for payment is to be made by the holder or his agent. Mr Chitty adds that the Agent must be competent to give a legal acquittance or discharge. I cannot think this is Law. If he is to give an acquittance, it must be by deed, & without an appointment by deed as by Power of Attorney, he cannot bind his principal by deed. There is no need of an acquittance for the blank may be filled up with one. The acceptor in tendering the money cannot be said to demand a discharge. And if he should please he tendered the

Lex Mercatoria. Bills of Exch. & Prom. & Notes.

money to the holder & would have paid it, provided he would have given him (or accepted) an acquittance. This plan is not good. now this is conclusive, & this I take to be the rule in all cases. & I plan by the Dublin that he tendered 10 & would have paid it provided the C.D. would have given him a discharge is not good. he has no right to insist upon an acquittance. the C.D. does not compel y^e other parties to give him one. Upon these principles I am fully confident that it is unnecessary & immaterial whether the agent is competent to give a discharge or not. 1 Esp R. 115. 10 T.R. 167. 10 Mod 286. Chitty 134.

There is a rule laid down by W. Chitty, C.J. seems to imply a negative. Chitty 137. See also Peake R. 179. 180. S. Kay 2. 742.

As a general rule presentment is to be made by the holder or his agent. & on the other hand it is in general to be made to the Drawee in person, but this is not universally true; for if the acceptor is not at home it is in general sufficient to present the Bill at his house or place of business. If a place for payment is appointed, it is in general sufficient to present it at that place whether he is present or not. Com Di. to March 2. P. 2. H. 182509. 12 Mod 241. 10 T.R. 167. 1 Esp R. 4. 1 Esp R. 512.

It is said that if the place appointed for payment is the holder's house an inspection of the holder's books is a sufficient demand. I do not know how this solemnity can be very important.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

It can be no need of it. If the acceptor has accepted to pay, to pay at the holder's house it is his, & acceptor's business, to go there, & if the holder is from home he may tender the money. 2 H. Bl. 509.

If the acceptor has removed after acceptance the holder must enquire to what place he has removed & present the Bill there. This rule presupposes that no place is pointed out either in the Bill or acceptance where payment shall be made. The holder is not bound to do this if the acceptor has absconded, in such case presentment is unnecessary (because impossible)... And if the acceptor has left a State or Kingdom, the holder is not bound to follow him: presentment at his house is sufficient. Shaw 1087. 2 Ray. 734. 1 Esp. R. 511 Kyd 125. 127.

March 19th 1812. Sectⁿ 15th

The time of presentment for payment, where the Bill is payable at a certain time after sight, or at usance depends on the appointment made in this respect in the instrument. You will observe, the time of presentment for payment is not the same as the time of presentment for acceptance. When the time is not expressed in the Bill or acceptance, the time of presentment for payment must depend on the circumstances of the case. It must be made in a reasonable time. What is a reasonable time has been before illustrated. It is the same in this case as in the case of presentment for acceptⁿ. 6 H. Bl. 136. 137. 140.

Lex Mercatoria. Bills of Exchange & Promy. Notes.

I have observed that where the time of payment is appointed, that appointment regulates the time in which payment must be made. Still in this case the time of payment is not at the times mentioned, for according to Lex Mercat^a "days of grace" are allowed. When however a bill is payable on sight or on demand it is said days of grace are not to be allowed - to this there are contrary authorities, & the latter I take to be the better opinion; & so far as I have been able to ascertain the latter opinion has been uniformly followed in the United States. If these latter opinions are Law the rule will be general that days of grace are to be allowed in both cases, i.e. whether the bill is payable at a fixed time, or on sight or on demand. 4 T.R. 170. Poth pl. 12. 198. 172. Beames 256. 1 Show 163. Kyd 10. 1 Barnard. 303.

The American Authorities are all in favor of days of grace in all cases. 1 Johnsons Cases 328. 2 Cairns T.R. 343. 2 Cairns Cas. in Error 195. 4 Dallas 147.

If a Bill is drawn at a place using one chronological style, & payable on a day certain, at a place using another style, the time of payment is to be determined by the style at the last place for there the act is to be done. If then a Bill is drawn in the United States payable at a given time in Russia, the time of payment is to be computed according to the Old Style. Beames pl. 251. Pothier pl. 105. Barclay 68. Chitty 59. 60. 64. 33. X Kyd 8 not Law.

If a bill is drawn payable at a certain

Sex. Mercatorum. Bills of Exchange & Promissory Notes.

If a Bill is drawn payable at a certain time after date or sight or at usance, the day of the date in one case & ~~of~~ of the presentment in the other is ^{in computation} included. e.g. a Bill is drawn on the 1st. of January payable 3 months after date the day of the date is included. This is of rule of Law Merchant. The rule of C. Law is different, for if an obligation is payable at a certain time after date, the day is included, but if payable at a given time after the day of the date it is excluded. The Law Merchant knows no difference between the terms "after date" & "after the day of date". In both cases the day is included. 5. Ray? 280. Bawes pl. 252. Both pl. 15. 13. 6th 10. 212. Contr. 37. not Law Merchant 376. With respect to the C. Law see 2 Vent 308. 310. Com. 714. 3d R. 823. Foul on powers 448.

If a Bill payable at a fixed time after date, happens to have no date, the time of payment is computed from the day on which it is issued, & this may be proved by parol evidence. But that day is excluded, the day after is the first in the computation. 5. Ray? 1076. 4th R. 337. Com. Di. lit. Stat. V. 3. Bac. ab. lila. 24. 1. 1.

Days of grace are so called because the indulgence was originally gratuitous, on the part of the holder. The acceptor originally could not originally claim it as a matter of right, but now he can. Usage has established that to be matter of right, what was originally gratuitous. 4 T. R. 121. 2. Ray 9. 10. 12th 125. 126. R. 59. 261.

Sex Mercatoria. Bills of Exch. & Promy. & c.

The number of these days of grace is different in different Countries - and the *Lex Loci*, i.e. the Law where the Bill is to be paid, governs. In Eng^d. & in this Country, the number of days is three. I say in this Country because I believe the rule is universal thro' the States. (Chitty 130. Beames p. 260. Ryd 9. 10.)

The days of grace then are always computed according to the custom of the place where payment is to be made - & payment is to be made on the last day of grace. If then a Bill is drawn payable on the 1st day of Jan^y. payment is not to be made till 4th. The acceptor is under no obligation to pay till the last day, & therefore it is necessary to present the Bill for payment before that day - and in Eng^d. & in this Country Sundays & Holydays are included. If then a Bill is payable on Saturday, Sunday is counted as the first day of grace. (Chitty 140. 143. Poth. 109.)

If then the last day of grace happens to be on Sunday, or in Eng^d. on a great holiday, as e.g. Christmas, the demand should be made on the second day of grace; & if the Bill is not then paid it is considered as dishonoured. Suppose then the Bill is payable on Thursday, payment must be made on Saturday, for the last day of grace is on Sunday, on which day no business can be transacted. The acceptor however can claim but 2 days of grace, for as I have observed days of grace are matters of indulgence, & shall not be so construed as to give the party 4 days. 2 Ryd 743. Sta 829. Ryd 120.

Lex Mercatoria. Bills of Exchange & Prom. Notes.

But when the days of grace are all days of business, presentment before the law is a nullity. No protest can be made for non payment before, or if made cannot oust the prior parties. 180 p. 10. 261.

In the Law Merchant, the word "usance" is used to designate a certain period of time appointed by custom or usage for payment of bills drawn in one country & payable in another. e.g. The merchants in London were in the habit, by long custom, of drawing bills of exchange on the merchants in Amsterdam, payable at a certain time after date, (as 3 months I think) - and this length of time has by long usage become well known by the term usance which has now been converted into a *Sanctum*. If then a bill is drawn on Amsterdam (at Amsterdam e.g.) the day of payment is to be computed according to the length of an usance at Amsterdam. Chitty 141.

And Foreign Bills are usually drawn in this manner, i.e. at usance. The length of time denominated by an usance is different in different countries. Ry. 4.

If a bill is payable a month or months after sight or date, the computation is by calendar & not by lunar months. This is opposed to the general rule of C. Law - for at C. Law lunar months govern the computation. If e.g. a lease is made for a certain time as 6 months, the term expires in 24 weeks or 6 lunar months - & so if a bond is

Lex Mercatoria. Bills of Exch. & Promy. Notes.

is made payable 6 mo. after date the time is computed according to Sun and months. 1 Deauv. pl. 253.
Rij. 6. Ch. 143. For the Common Law rule see B.C. 141.
6 T. 224. 2 East 333.

If a bill is payable at a fixed period of ex sight, the time is computed from the day of acceptance or presentment for acceptance. Com. de. cit. "march." F. y. 6 T. 212.

When no certain time of payment is pointed out in the bill or acceptance, the presentment for payment must be within a reasonable time. What is meant by a reasonable time has been before sufficiently explained. If then a bill is made payable on demand or sight, presentment must be made within a reasonable time, according to the circumstances of the case. Sha. 415. 508. 1175 1248. 2. Ray. 928. 1 T. 216. 2 H. 216. 555.

The day of presentment, being appointed or ascertained, presentment for payment must be made within a reasonable time, before the expiration of the day, & within the usual hours of business. Rij. 125. Chilly 69. 148. Bailly 59. 67.

On presentment for payment the Bill should not be left with the Drawee, unless he pays it - if it is left, it is not considered that presentment is made till the money is called for. Sha. 416. 910.

Presentment for payment, should be made in general only by the owner of the Bill, or his Agent - and on the other hand, payment should be made

Vex. Mercatoria. Bills of Exch. & Promiss. Notes.

in general only to the owner of the Bill or his agent.
If then payment is made to the original Payee
after he has negotiated the Bill, it will not avail
the Acceptor, for the Payee is not the owner of the
Bill, he has parted with his interest and payment
has been made to a wrong person. *Poth. pl. 184 Chitty 149.*

If a Bill is payable to A. or order for use
of B. payment should be made to A. or his order, &
not to B. or his order. for A. has the legal interest
& B. only the equitable interest which is not known
or regarded in the Law. *2 Vent. 310. Carth. 1. Ky 107. 108.*

But the presentment for payment is to be
made within the usual hours of business, yet it
is a general rule that when money is to be paid on
a day certain, the acceptor or the party liable is
allowed until the last moment of the last day
of grace to pay it in. E.g. He has obligated himself
to pay on the 1st of Jan'y. Now if he pays on that
day he discharges himself. The holder however may
must present within the usual hours of business
yet the acceptor can claim the whole of the last
day of grace in which to make the payment.
This is a rule of the English municipal Law.
1 Roll R. 189. 1 Sams 207. 4 T. R. 173.

The rule just laid down does not extend
to Foreign Bills. The reason is in Foreign Bills
Protest is to be made & when necessary it must
be made on the day of payment, i.e. on the last
day of grace & if the party bound to pay could

Lex Mercatoria. Bills of Exchange & Promissory Notes.

delay until the last moment of the last day, a valid protest could not be made. The acceptor in case of Foreign Bills then cannot discharge himself only by payment of the money, & this is to be done early enough in the day as to leave time sufficient to make a Protest. Ryd 121. 4 St. B. 174.

For the purpose therefore of leaving nothing vague or uncertain on this subject, it is enacted that Foreign Bills shall be paid within the usual hours of business. In case of Inland Bills the first general rule holds. The acceptor also there is allowed the whole day to make payment, & here no protest is necessary, & therefore the reason in case of Foreign Bills does not apply as to Inland. 4 St. B. 170. Bailly 67. Poth. pl. 140. On Ryd 121 and 4 St. B. 174 a doubt is expressed as to the rule above, applying to Inland Bills of Exchange.

If a Bill drawn here is payable in a Foreign Country, & in foreign Coin, the value of which is ascertained, it is to be paid according to the value of the Coin at the time of drawing. This rule as well is affixed to the one yesterday laid down, as to the depreciation of Exchange. Suppose a Bill is drawn on Denmark, payable in Rix dollars, which now are of a given amount, & before the day of payment they value 10 per cent. Now if the Bill is drawn for 100 Rix and payable in Rix dollars, one half of these will not discharge of the obligation. They will amount in value to but 90 Rix, owing to the 10 per cent depreciation. Thoms 272. Chittys 184.

Lex Mercatoria. Bills of Exchange & Promy. Notes.

If the holder compounds with the acceptor with
out the consent of the other parties these latter
parties are discharged; for by compounding with the
acceptor, as e.g. to receive 50, p.c. on the face of the bill,
he determines the liability of the acceptor. and the draw-
er or he were compelled to pay could not recover the
difference of the acceptor. and now having done this
the holder cannot compel the prior parties to pay
the residue. Chitty 155. 155. Cooks Bank. Jan 160

But the rule is otherwise if the holder merely
receives a dividend, the acceptor being a Bankrupt;
for this is all he can do - he does not voluntarily
make this compromise, for the Law has deprived him
of recovering any more i.e. out of the acceptor; And
in such case it is an advantage to the prior parties
that the holder should receive from the acceptor
what he can get. Chitty 155.

It has been said that if the holder receives
of the acceptor, a less sum than is due, tho not
received in full satisfaction, yet if he does this with
out the consent of the other parties they are dis-
charged, because it is said by receiving a part he
makes his election to receive it of the acceptor. I
am unable to discover how he makes his election
by receiving a part. There are very respectable
opinions that the above is not Law. It is true that
when he receives a part it is his duty to inform
the prior parties of the non acceptance of y. residue.

Lex Mercatoria. Of Bills of Exchange From 4. Solus.

If he gives this seasonable notice, I see no way in which the Prior Parties can be injured by his receiving a part - but the probability is it will be an advantage to them. I think this rule indispensable. For the rule as Mr. Caid down see 2. Ray^d. 744. Stra 740.

3. & 4. P. 273 Contra see S. & P. 271. 273. 275. And see Buller's opinⁿ. Chetty 156. 160. Cook's Bank. Cas 167.

It is said by Mr. Chetty to be doubtful whether the party bound can insist on a receipt for the money as a condition for payment. I trust he cannot. It is certainly true that in cases not falling under Lex Mercatoria he cannot; neither can he, however, where they do. He can call witnesses to evidence of payment, & is moreover entitled to the Bill which being in his possession is prima facie evidence of payment. 2 Ray^d. 742, Peak 179. 180. 79. 80. 2. H. Bl. 31. 1 Vin. ab. 192. For Case. 14 S.

A general receipt endorsed on the back of the bill, & not naming the Party paying, is prima facie evidence the payment was made by the acceptor. The reason is the acceptor is the party first liable, & if payment has been made the presumption is, it was made by the acceptor. If this payment is made by the Drawer or Indorser, the receipt should express the party paying. Peak B. 25. Ch. 157. 8. 209.

If payment is refused the holder must protest the bill if Foreign, & whether Foreign or Inland must give notice of this fact to all parties

Lex Mercatoria. of Bills of Exchange. Promy. Notes.

to whom he intends to send for payment, and if he does not take this course, the prior parties are discharged; for as they are discharged by want of notice of nonacceptance, so also if the holder neglects to give notice of nonpayment he can have no claim on them. Chetty 158. 207.

The rule in case of notice of nonpayment is the same, as that of giving notice of nonacceptance, must also must advise. the form of protest for nonpayment. See Chetty 150.

If part only is paid the Bill is to be protested, if Foreign for nonpayment of the residue, & both in Foreign or Inland notice of the refusal is to be given to the prior parties except where notice is waived or excused, & for the purpose of ascertaining when it is waived or excused see the rules & authorities before laid down in case of nonacceptance.

In certain cases under the Stat. 3 and 4 William 3^d. Inland Bills may be protested, but this is done for the purpose of entitling the holder to recover Interest & charges as well as the amount of the Bill. The effect of this Statute is only to give the holder an accumulative remedy. It is not necessary for him to protest the Bill, in order to subject the party to the amount of the Bill, for so far he was liable before the Stat. was made, but if he would recover interest & charges also he must, according to the Statute, protest the Bill. 2 Phylp 910 2102. 487.

Sex. Mercatoria. The Exchange & Money Notes.

Protest for nonpayment of a Foreign Bill must be made on the day of refusal, & then notice must be sent to the Prior Parties by the next ordinary conveyance - by the mail if the same day if possible, & if not by the next ordinary conveyance mail or otherwise. 4 Edw. 1742 Reg. 43. & 8 Reg. 2. 1761 BC. 565.

In the case of Inland Bills however, it seems notice need not be given until the day following the day of refusal to pay, and indeed if the acceptor insists upon his right to delay payment till the last moment of the day, it cannot be given. 1 T. R. 168. 169. 4 T. R. 170.

Notice however in this case should be given on the day following if possible, otherwise the prior parties are discharged. When a day notice must be given, & when notice is necessary may be, must be sent, - 1 T. R. 168. 9. Day 575. 2 T. R. 565.

When a Bill Foreign or Inland is dishonoured Payment *Supra* protest may be made for the honor of the Drawee or an Endorser. You recollect this might be done in case of nonacceptance, so also when the acceptor refuses to pay, Payment *Supra* protest may be made. Baines p. 59. Chetty 103. 115.

But if the Drawee has once accepted, according to the law, he can't pay *Supra* protest for the honor of an Endorser, for as to him, the acceptor is bound by his previous act of acceptance. Baines p. 56. Chetty 115.

But

Lex Mercatoria. Bills. Exchange. Promy. Notes.

But if the acceptor has no effects of the Drawer he may after an acceptance according to the tenor of the bill, protest it & then pay it for the honor of the Drawer, & by so doing, he acquires a remedy on the Bill. For as between the Drawer & acceptor, the question depends upon whether he has effects or not; but the want of effects cannot vary the liability of the acceptor as between him & an Indorsee. As respects the Indorsee he is bound by his acceptance.

Mr. Shilly 163. 164. Says the payment in such case is to give the acceptor a remedy both to the Drawer. But this is not the case, for he has a remedy either whether he (the acceptor) pays the bill according to its tenor or whether he pays it supra protest for the honor of the Drawer. If he pays it according to its tenor, his action is indubitably upon the bill; if he pays it supra protest his remedy is on the Bill. So that in either case he has a remedy, the only difference is, in the manner in which it is sought. And further - The acceptor by paying the Bill supra protest for Drawers honor, divests himself of a presumption that he is indebted to him, & thereby throws the onus pro bandi on the Drawer, whereas if he pays it according to its tenor, this presumption lies vs him, & on him (the acceptor) is the burden of proving the fact to be otherwise. Rep 153. 155. 1 Powl. 139. 1st R. 269. Baines 548 186 p 16. 113.

The rule as given in the Books is that the acceptor may thus pay supra protest, provided

Lex Mercatoria. Bills of Exchange. & Promiss. & Solus.

He has no effects in his hands, & is not indebted. But I suppose he may pay supra protest if he has effects, tho he would not have the right he has, in case he has no effects & pays supra protest for the honor of the Drawer. No one can decide whether he has effects or not. - With in the capacity Public nor the holder can do this, and therefore they cannot prevent his paying the Bill supra protest if he chooses. Chitty 164.

Generally payment should not be made for the honor of a party till after protest for nonpayment. And without a protest the party paying acquires no right to recover on the Bill vs. the prior parties. Beavis pl 53. Chitty 105. 163. - This undoubtedly if the Drawer having no effects of the Drawer, pays the bill for his honor but without protest, he may recover for money laid out for Drawers use, tho he cannot recover on the Bill. Ryd. 156. 153. Chitty 163. 191. 203. 205.

And I must that a Stranger, i.e. a third person, who has before accepted supra protest for the honor of a Party may afterwards recover of him for money paid out for his use, if the Bill is not protested for nonpayment. True, he cannot recover on the Bill, because he is not a party to it.

I add that as a Stranger may accept for the honor of the Drawer or Indorser, so he may pay for the honor of either of them, & having paid supra protest he has a remedy on the Bill vs the party for whose honor he paid & against all the prior parties. Chitty 164.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

March 20th 1813. Sect. 12th

In my last Lecture I concluded the observations I had to make on Bills of Exchange, except a few as the remedies on them, of which here after. I shall now treat
(of Promissory or Notes.)

A Promissory Negotiable Note, is a direct engagement in writing to pay a sum of money to a person therein named, or to his order, or to bearer. It is, in other words, a direct engagement to pay a sum of money, to a person named, containing operative words of transfer. 2 Bl. C. 467. Kip 35. 18. Chitty 105.

A Promissory note is somewhat in the nature of a Bill of Exchange drawn by the maker on himself. The analogy between the two does not however arise till the Note is negotiated. When negotiated it resembles a Bill of Exchange. The maker of y. Note is like the acceptor of a Bill. The maker promises to pay, & is the party first liable, the same as an acceptor is liable on a bill of exchange. It is held that a Promissory Note is not negotiable, at C. D, tho it contain operative words of transfer, i.e. the maker payable to order or bearer. And at C. D. a Promissory Note is not an instrument on which an action could be founded, but mere evidence of a parol promise. So that if A. gives a Note to B. & sues his remedy vs A. is at law. He claims upon the parol contract, as for goods sold & taken. The note is good evidence to support the allegation in y. Declaration. Kip 18. Bull 129. 2 King 707. 3 Bur 1520. 4 S. 16. 151.

Tex. Mercatoria. Bills of Exchange & Promy. Notes.

But Notes made payable to order or bearer were put upon the same footing as Inland bills of Exchange by the Stat. 4 & 5 Ann. made perpetual by 7. Ann. In other words by the former Stat. notes were made negotiable if containing operative words of transfer & other requisites of a good & negotiable Inland Bill. They were by this Stat. converted into legal instruments on which an action might be brought. Kap 19. Ch. 167 & 169.

In Conn. we have a similar Stat. recently made, by which promy. notes payable to order or bearer & for the sum of 35\$ or more, are made negotiable the same as Inland Bills.

Now as Promissory Notes are put upon the same footing as Inland Bills of Exchange, the same rules mutatis mutandis as apply to Inland Bills regularly apply to Promissory Notes. It is therefore unnecessary for me to go over the ground again, & repeat the rules before given.

It is now settled, the formerly considered otherwise, that days of grace are to be allowed upon negotiable Promy. Notes as upon Bills of Exchange. When I speak of "Promissory Notes," I am to be understood as meaning negotiable Promy. Notes, unless I am expressly to the contrary. 4 T. R. 152. B. & P. 274. Doug 61. 63. 1st. 12 167. Chitty 169.

A Promissory note, when endorsed, bears as I have before observed a strict analogy to a bill of Exchange. The Drawer of the note is as the acceptor of the Bill, the Indorser of the note is as the Drawer of

Lex Mercatoria. Bills of Exchange & Promissory Notes.
of the Bills, and the Indorsees of the notes, the same as the
Payee of the bills. 11 Dec 676.

Bankers Cash Notes, are in reality nothing more
than a Species of Promissory Notes given by Bankers.
Nor were these determined to be negotiable till since
the Stat. of Ann (ante) which made all notes negoti-
able the before that time they were frequently ap-
peared. — Sta 4. 15. 550. Holt 199. Salk 283. 3 Rev. 299. S. Ray?
180. 6 M 108 29. 30.)

Bankers Cash Notes being payable on demand
are treated & considered as cash whether payable to order
or bearer, & this by the consent of the mercantile world.
They constitute a circulating medium. S. Ray? 744. Doug
635. 7 M 11. 423. 3 Rev 1517. 1519.

Thus Bankers notes as they are regularly trans-
ferable by delivery are as I just remarked treated as
cash. If then they are endorsed they may be declared
upon as Bills of Exchange. S. Ray? 743. 1 Salk 102. 103. 4 R. 2149.

Bank notes again are really nothing more
nor less than Promissory negotiable Notes issued by a cor-
porate banking Company. They owe their origin to
the Statutes incorporating Banks. Tho in form they
are nothing more than negotiable Promissory Notes yet
they are considered as money and will pass in a bill
as money. — As if a man should devise all his mo-
ney to c. t. these notes will be included in the descrip-
tion. They are not actually money, but for most
purposes they are treated as such.

These Bank notes are generally payable

Sex. Mercatoria. Bills of Exchange from Notes.

on rem. are the same as Bankers notes: and are not generally considered as securities for money merely, but as money itself. 11 Den 457. 3 T. R 534. 4 T. R 335.

But the Bank Notes are considered as money for most purposes, yet an action for money had and received will not lie vs. the finder of Bank bills unless he has received the money on them. for this action for money had & rec^d. will lie only for money properly so called. 2 T. R 528. Comf 197. 1 T. R. 239. 2 T. R 1269. 5 Den 255. 3 East 169.

Bank notes again are not a lawful tender, provided the Creditor objects to them at y^e time on account of their being Bank notes. But if he does not object on this account the tender will be good. 3 T. R 534. 1 Eq. Ca. ab. 318. Doug 662. 2 Brev. 528.

No particular form of words is necessary to create a Promissory Note. Any writing in general containing an express promise to pay money, viz also the proper words of transfer is a promissory negotiable note. Hence a Promise for value received to account to A or order for a certain sum, &c. is also as a Promy. note. The Eng. word "account" is used instead of the word "promise". 8 C. R 362. 12 A 629. 786. 2 Hag. 1396. 1 Atk 32.

But the mere acknowledgment of a debt without words amounting to a Promise will not operate as a Promy. Note. Thus the whimsical memorandum used in Eng. to evade the Stamp duty consisting of the letters "P. O. U." now sent over or under a seal

Lex Mercatoria. Bills of Exchange & Promy. Notes.

evidence of indebtedness but it is not a promy. Note. 10 Rep. 426.

And the same requisites are necessary to a negotiable promy. Note as to a Bill of Exchange. It must be payable in money & money only it must be payable at all events & not upon a contingency. The same rules as to Bills of Ex. apply as to Promy. Notes. 1 Bur 323. 5 Rep. 2486. 4 Rep. 149. 7 T. R. 243. 733. 1187. 1271. 4 Mod 242.

If an instrument then containing a Promise to pay wants either of these requisites it is not a negotiable promy. Note. It is evidence of a Parol agreement to pay, & as between the Parties may be declared on as a Promy. Note. 7 T. R. 243.

By a late Statute in Con. no action can be brought on a promissory Note unless within 6 years from the time the right of action accrued. This Stat. in this respect is the same as that of 21 Hen. 8. in Eng.^d. As to Bonds the limitation is 17 yrs. The Stat. provides that the time during which the maker is out of the State is not to be computed as part of the time.

It is unnecessary for me to pursue the subject of Promy. Notes any farther. I shall now consider,

The Remedies the Holder may have upon a Bill of Exch.^d or Promissory Note.

The usual action brought on a Bill or promy. Note is that of Assumpsit. And this is said to be the only remedy, where there is no immediate privity between the parties as between the endorser & indorsee 12 Ch. 179.

The holder may maintain this action, & as in

Lex Mercatoria. Bills of Exchange. Rom. y. 801.

the parties severally. We cannot join the different parties in the same suit. The maker & indorser of a Rom. y. 801. cannot be joined any more than the maker & drawer & acceptor of a bill of exchange. They may be all liable & liable at one & y. same time. yet their liability is not identical, the cause of action is not the same. Each party makes a distinct contract, therefore there can be no joinder of them. 4th B. 471.

Thus the action of Assumpsit lies vs the acceptor or indorser. it lies vs the indorser as y. acceptor, drawer or indorser, & it lies vs all these in favor of the assignee by delivery. But the assignee cannot maintain an action vs any person whose name is not on the bill, except as the person of whom he received it, & in this latter case he cannot maintain the action on the bill, but on the consideration of the transfer, as if the consideration was goods sold & received. he may sue for them. No person you recollect can be a party to a bill, unless their name is upon it, except the holder. Suppose then a bill is drawn upon A. & transferred to B. by endorsement, & B. transfers it to C. by delivery, no action can be maintained vs B. on the bill, in favor of C. for B's name is not upon it. C. may however recover on the consideration of the transfer, as for goods sold, Cabodone, &c. But suppose C. transfers the bill to D. by bare delivery, now C. can't maintain his action vs B. on the bill, but he may on the consideration. But B. can maintain no action vs D. He cannot

Tex. Mercantile. Bills of Exchange. 7th Nov. 4. c. 1865.

maintain an action on the Bill, for B's name is not up
on it, nor can he maintain the action, or any con-
sideration, for as believed ^{there} never was any con-
sideration, no indorsement moving from B. to D.
7 D. M. 64. 2d Ray. 528. 12 Mott 244. 408. 521. 11. 815. 516.

I observed the Holder might in general maintain
vs the prior parties. So also the action may be maintained
by the Drawer vs the acceptor, if the acceptor refuses,
the Drawer is compelled to pay, because the acceptor is
first liable, & the acceptance furnishes a presumption
that he is indebted to the Drawer. Mr Chitty has on
this subject a rule which is incorrect. He says the
Drawer may maintain an action vs the Drawer
for refusing to accept. This is not sound, for before y.
acceptance he is no party to the Bill & he refuses to be-
come one. Even if the Drawer has apptly in his hands
he cannot be compelled to accept the Bill. & the Draw-
er can recover them out of his hands. And it would be
a strange doctrine to make him liable for refusing
in case he had no apptly. It is clearly absurd. Chitty 180.

And in general any party having been com-
pelled to pay the Bill may maintain this action vs
any prior Party. By Prior Party is meant any one whose
liability is prior to his own, & on this ground it is that
the Drawer can recover of the acceptor. The above rule
presupposes D's name is on the Bill, for otherwise he
is not a Party. 7 D. M. 571. Chitty 180.

If one accepts for the accommodation of the
Drawer, by what is meant that he has none of the

Lex Mercatoria. Bills of Exchange. Promiss. Solus.

Drawers effect, & is obliged to pay the bill. he may recover of the Drawer in the action, tho he cannot maintain it on the bill, unless he accepts supra protest; he may recover the amount out of the Drawer as for money paid out & expended for his use. If he accepts supra protest, he has a remedy on the bill, for by so accepting he becomes a party. Reg 156. 196. 1 St. R. 109.

This action will lie for a Stranger who pays the Bill supra protest, as the parties for whose honor he paid & all the prior parties - and when he pays supra protest he may have an action on the bill, he then becomes a party. Reg 196. Chitty, 189.

It is a general rule, that an action will not lie vs one who becomes a party to the bill after its present holder. Thus if A. the Payee of a Bill endorse it to B. and B. endorses it back again to A. A. cannot recover vs B. for if B. could recover the same back & after 2 Laws with they w. stand in statu quo. 4 St. R. 470.

But this rule (supra) can't hold in favor of the acceptor or drawer or any of the prior parties to A (in the e.g. above). Indeed in its terms it will not hold as to the Prior Parties...

The action will not lie vs the party from whom we received the Bill, unless he paid a valuable consideration. The reason was given before. Now as the rule has been shaken by a decision in New York, but it is the rule in England. Reg 158. 7 St. R. 121. 571. 360. 1 St. R. 109. 581. Young 312. 146. 189. 2 St. R. 244. 601. 602.

Sec. Mercantile. Bills of Ex. & Promiss. Notes.

If the Acceptor makes the acceptor his executor & dies, the right of action vs all the parties is extin-
guished. 12 Cow. 184. 543. 3 B. & C. 299. 2 B. & C. 511. 12 B. & C. 18. 2 B. & C. 191.

The reason of the rule supra is that by the act
concerning the acceptor his executor, the primary
liability is discharged, & of course the secondary must
be. By the other parties are liable only in case the accep-
tor fails & he is discharged, they are of course. Besides the
transaction destroys the claims of the other parties
on the acceptor. The acceptor represents the debtors and
creditors the right & duty unite & he cannot sue him-
self. This by the way is a rule of Law. - In Equity
where the justice of the case requires, he may be con-
sidered as the trustee for the creditors, & may com-
pel him to pay.

The holder may at the same time commence
an action vs each of the Parties on the Bill. If he ob-
tains satisfaction of one, the rest are discharged ex-
cept for the costs which have accrued on their own
suits. They can not be compelled to pay the debt an-
again. 1 Wils. 46. 3 B. & C. 86. 2 B. & C. 499. 4 B. & C. 591. Ch. 181. 2. 193.

If there is an action vs the Drawer or Endorser
or the Drawee pays the amount of the Bill & the costs of that
particular action vs himself, the Co. will stay pro-
ceedings vs him, how many other actions there may
be pending vs others. 1 B. & C. 591. 3 B. & C. 515. Chitty 192. no
authority in B. & C. 797. not Law.

If however an action is brought vs the acceptor
& the other parties also there will be no stay of proceedings

Sex. Mercatorum. Bills of Exchange. § 10. (Sole.)

in the action, vs the acceptor, unless he pays in addition to what is due on the Bill, the costs of all the other suits; for his liability is primary, & he is the first defaulter. The others are sued in consequence of his neglect; he must therefore pay all the costs.

With respect to the former rule, vs Drawers & Indorsers, I do not see why this last rule should prevail in relation to those parties, (i.e. in relation to Drawers & Indorsers, when they are sued whose liability is subsequent to theirs, (Drawers & Indorsers). As e.g. it is the duty of the Drawer to pay, when the acceptor is guilty or neglectful. Now I should suppose the Drawer ought to pay the costs of the Indorsers actions, for the Indorsers liability is subsequent to his, & it is only after the Drawer neglects to pay that the Indorsers regularly become liable. The rule does not however seem to extend thus far. Same author?

But the holder may have several actions vs the prior parties who are liable on the Bill & may pursue them all to judgment, & take out Executions vs the persons of all, yet he can have but one fieri facias. This is an execution vs the goods of a person on which the money is to be raised. § 11.

And if after he has obtained complete satisfaction out of one, he sh^d. happen to take out Executions vs another & give him to recover what he had already received from a former party, this also may be resisted by an *excepcio Repleti*.

Sec. 1. Declaration. Bills after Short Promy. Notes.

The Declaration in this action of Assumpsit may in general be founded either on the Instrument itself or on the consideration of it. Thus if A draws a bill in favor of B. and it is dishonored. B. may sue him on the Bill, or on the consideration of it as if he was promissorily indebted, or if goods were sold &c. he may sue for the previous debt, or for the goods &c. which was the consideration of the bill. In the former case the Bill is counted upon as an instrument. in the latter it is used as evidence of a prior contract to pay, the debt, or for the goods &c. 3 Burr 223. 2611. Cowp 832. Ryd 58. 177. 197. 3 T.R. 174. 3 Burr 1516.

In the latter case, i.e. if he sues on the consideration of the transfer, he declares on what are called the "Common Counts", as for goods sold &c. delivered, labor done &c. performed, money had &c. received, or money laid out &c. expended, & in ~~all~~ almost all these actions those common counts are inserted, for the purpose of subjecting the Defend. upon one in case the ~~1st~~ fails or another. If e.g. he fails to prove the count for money had &c. received, he may recover on the one for goods sold &c. delivered. Having a number of counts in his Declaration he stands a chance that his evidence will conform with some one of them & on that he will recover. Talk 24. 3 T.R. 174. Ryd 197. Chitty 184. For the forms of declaring upon Bills and on the Common Counts see Chitty from 233 to 248.

It was formerly usual to allege in the Declaration on a Bill of Exchange the custom of Bank

Sex. Mercatoria. Belli, Paris, & Pomy. Sales

Merchant. This is unnecessary. The Pitt govern-
 ment has declared upon a Bill used to set out the
 Law merchant which governed his particular case.
 He would state that by the happening of such trans-
 actions (as e.g. the drawing, accepting or endorsing of
 Bills) the Draft becomes liable to pay. But it is
 now unnecessary even to refer to the Customs of
 merchant. The Law Merchant is now the Law.
 properly so called. P. Reg. 21. 33. 173. 1542. Cal. 83. 267.
 270. 2. 226. Reg. 177. 179. 180.

In dealing upon a Promissory Note, however
as it is usual in Eng. to assign it. It becomes li-
able by virtue of the Stat. of Ass. (ante). Now I can
not discover where is the necessity of this form. The
Stat. is a Public one - and there is no need of counting
upon a general Stat. unless it is a penal one. The
reason why this form was originally adopted, was
I conclude, out of the abundant caution of Law-
yers to show that the plff's right of action came
within that Stat. as that Statute gave the right
to sue. This is the only way in which I can account
for so unlawful a like a proceeding. *Chitty 185. 240.*

In counting upon yr. instrument itself it is unnecessary to allege a conservation, for the Law in this one. as in case of Deeds. 1 B.C. 487. 2 L. Ray. 758. Ky 40. 2 B.C. 440.

And in declaring on a Bill of Exche. or Promissory Note it is
not necessary to plead the same with Protest for it is not per se
a specialty. It is so far a specialty that the law presumes a con-
sideration. 1st ed 386. 4th ed 338. Dumbury 243.

Lex Mercatoria. Bills of Exchange & Promissory Notes

Afternoon. March 10th 1813. Sect. 13.

When a Bill or Note cannot take effect according to its form, the more proper way of deciding upon it, is to state it according to its legal operation. The instance of a Bill payable to a fictitious Payee will illustrate this. For in such case the Parties are bound as on a Bill payable to bearer, & it is proper to declare upon it as such a bill; and then the special facts as to the Parties who knew it was fictitious will support the averment. 3 T. R. 178. 282. 481. 643. 176. M. 313. 589. 2 Id. 194. 208. Chitty 48. 58. 185. 186.

And when a Note is payable "to the order of A." instead of being payable to "A. or order," the plff may declare upon it as a note payable to himself, & it is legal effect it is the same as a note payable to "A. or order" tho' it is proper to be payable to the order of A. only. 2 Thom. 8. Co. 403.

In actions on Bills of Exchange, it is not indispensably necessary, tho' it is usual, to allege a promise to pay. It is sufficient so to describe the bill as to show how the plff & Defl. became parties, & also to show by facts the Defendant's liability. This however is not the usual mode, i.e. to raise a promise, & it is unnecessary. Lord Holt says "drawing a Bill of Exchange is equivalent to an express promise to pay." The ground on which it is holden to be unnecessary to raise the promise is, that the Law does not raise it by the custom of the Merchant. Co. 403. Salt 128. 129. 538. Kay 146. Chitty 184. 185. 206.

Six. Mercatoria. Bills of Exch. & Promy. Notes.

And whenever a party shall become a party by procuration, i.e. by the act of his agent, it is not necessary, tho it is usual to state he became a party in this way. It is unnecessary for if the Bill is alleged to have been drawn by A. and it is proved to have been drawn by B. who was his agent, it is a sufficient support of the argument in the declaration that it was drawn by A. according to the well known maxim, "qui facit per alium facit per se". 176. B.C. 313. 5 D.R. 659.

The Indorser may declare to his immediate Indorser as on a bill of Exch. drawn by the Indorser & payable to himself, because in legal effect the endorsing a bill is equivalent to drawing a new Bill. The rule is laid down as above in 4 Books. But I have no doubt but any subsequent indorser may so declare if the indorser's name is in blank, because he may fill it up with his own name and so constitute himself the immediate indorser. The rule as it stands is, that the indorser may declare to the indorser as Drawer. Now this would seem to imply that if the Bill is delivered over to C. a subsequent indorser that he by consequence not declare to A. the first indorser, as Drawer. But I conceive he may, if his name is endorsed in blank, for the reason above. 4 D.R. 149. 5 D.R. 743. 1 D.R. 674.

This however is not the usual form in which an Indorser is cited. This is generally said to be wrong, & the just state of the law. This latter is the

Sec. Mercatoria. Bills of Exchange & Promissory Notes.

safer way, because it saves an Question.

In an action on the Drawer or Indorser, the
Plff. must generally allege presentment for payment
and that the case may be presentment for acceptance.
So long as the case may be. It means if presentment
for acceptance is necessary, he must allege it.
But he must in all cases allege presentment for
payment, & also allege a refusal, & that regular
notice was given to Defend. unless in such case where
the Plff. is excused from giving notice. See 658. case
of Rushton vs. 40 Vin. 40. 5 Bar 267. 18. 11. 712. 18. 11. 405.
Chitty 188. 189. 202.

I observed in my morning Lecture that it
was usual for the holder to declare not only on the
instrument but on the common counts, & the reason
of inserting these counts was explained. & on the
Common Counts the instrument itself may be intro-
duced as mere matter of evidence. As e.g. the Plff.
could not support his action on the Bill he may
introduce the Bill to support the common counts, for
the Defend. may rebut the evidence. The instrument is
prima facie evidence only, & liable to be rebutted
by opposing testimony. See 725. 17. 11. 602. 18. 11. 425.

In some cases the holder of a Bill draws
the common counts alone without counting at all
upon the instrument. He has a right to do this, if
without the Bill he has sufficient evidence to sup-
port his action. But this is not usual unless the
instrument is defective as e.g. want of stamps. But

Lex. Mercatoria. Bill of Exchange. & Money. &c.

when it is taken as a note of exchange, it may still
continue to prove or support the common count, as it
is prima facie evidence of an indebtedness. In such case
the plaintiff's rule altogether on the common count.
2 B. & C. 174. 2 Shaw 501.

In the common count, by the way, the plaintiff
may go into proof of the consideration by parol, &
thus show his right to recover. He is not obliged to
prove the consideration by the Bill or note, for they
do not merge the indebtedness, as a bond does. & with
in is the plaintiff bound to produce the Bill, or if he does
he is not bound by it, but may introduce other evi-
dence. 3 B. & C. 174. 7 B. & C. 241. 1 B. & C. 245. 1 East 58. B. & C.
137. 2 Shaw 710.

Now where one takes a Bond from another
he cannot pursue this course. The Bond will not per-
mit him to prove by the Bond alone upon the considera-
tion of it for it is merged. But a Bill that is effec-
tually does not merge the indebtedness.

It just this said the instrument may be given
in evidence in support of the money (common) count.
There are some distinctions to be observed in cases
where the Bill may sustain it, or may not be used in evi-
dence, which I will exemplify.

In an action by the Payee vs the Drawer
of a Bill or note of exchange the instrument itself
may be introduced as prima facie evidence of money
lent. If then the Payee brings his action as Drawer
on the bill for money lent he may without taking

Lex Mercatoria. Bills of Exchange & Promy. Notes.

any notice of the Bill or note, in his declaration, produce it in evidence. It is *prima facie* evidence, that the money was lent. It is presumed when the Bill is produced on trial that the Plff paid the amount of the same, & therefore it is that the Bill, &c. is *prima facie* evidence of money lent to the amount of it. *Str.* 725. *L. Ray.* 278. 12 *Mod.* 380. 3 *Bur.* 1516. 1225. 6 *T. R.* 1213.

The rule is the same where the action is brought by the indorsee or his immediate indorser. The indorsement may be introduced as *prima facie* evidence to support a count for money lent, for the indorsement furnishes a presumption that the Indorser received the amount of the indorsement of the indorsee, & therefore that he should pay so much back again. 1 *Bur.* 373. *Chitty* 190.

And it is said that the Bill or note is also *prima facie* evidence of money paid by the holder to the use of the Drawee of the Bill or maker of the note. *Baily* 95. *Chitty* 191. I believe this point has never been judicially decided, but I see nothing in it unreasonable. The holder has paid the Indorser its value, the Indorser has paid the draw party and the draw party paid the Drawee, & the Drawee has on the Bill afloat in the World. Here without staining staining, the presumption ^{it may be supposed} that the holder has paid the amount of the Bill for the use of the Drawee, & that he himself did not pay it. *16. Ann.* 6. *1. Wain* 13. *1. Wain* 13. *1. Wain* 13. The acceptor is surely not the Drawee having in the benefit of so much money.

Lex Mercatoria. Bills of Exchange & Promissory Notes.

it may be considered as having been paid to his use by the Holder. It is on this ground I suppose the rule is given. It may however be considered as questionable by some on the ground that there is no priority between the Holder & the Drawer.

It has also been said that a Bill accepted is evidence of money paid by the holder to the use of the acceptor, & the consequence is the holder may bring an action for money laid out & received for the use of the acceptor. This doctrine is denied by Lord C. J. Eyre, on the ground that there is no priority between the Holder & acceptor. 1 H. Bl. 602; Bailey 95. Chit. 191.

The above rule is then to be considered as questionable. Again - The bill is said to be prima facie evidence of money laid out & received by the acceptor to the use of the holder. I am not aware that this is settled. It is true there is no immediate priority between them, tho' that objection is not so strong in this as in the last case. The acceptor is presumed to have effects of the drawer. He is then presumed to have that fund on which the Bill was drawn, & the holder is presumed to have paid the value of the Bill on the credit of that fund. [not exclusively on the credit of the fund, for there must be a personal credit like mine. That consideration is immaterial here however.] He is presumed to have those effects for the purpose of paying the amount of the Bill over to the holder. And in this point of view, it is not extraordinary that a rule like the above should have been introduced.

Lex Mercatoria. Bills of Exchange & Prom. & Notes.

If it is proved, it follows that the holder may bring *indebitatus assumpsit* vs the acceptor for money had & received, & that the Bill or note will *prima facie* prove it. 12 Co. Be. 259. *Daily 96. Chetty 191.*

If the Drawee, not having effects of the Drawer pays the Bill, the Bill in his hands is evidence of money paid, laid out, & expended for the use of the Drawer. Of course the acceptor may receive in *Indebitatus assumpsit* vs the Drawer for money paid &c to his use & the Bill is evidence of this fact. You observe it is an ingredient of the rule that the Drawer has no effects, and this fact he must prove, & having proved it, it is then evidence *ut supra*. If A requests B. to pay money for money for him, & B the not indebted complies with A's request, now it is evident this money is paid &c by B. to the use of A. and this is the precise case contemplated in the rule. 12 Co. Be. 264. 7. St. 576. 1 Esp. N. 232.

4. Bill or note is also *prima facie* evidence of money had & received by the Drawer as maker to the use of the holder. No one questions this rule. The proofs by which the rule is proved to be well founded is simple. The Drawer is presumed to have received the amount of the Bill; the Payee transfers it to another for a valuable consideration, & the Drawer refuses to accept or pay. By the supposition then the Drawer has received the value, & is liable to the holder & has come under an obligation to pay him the same value in case the Bill is dishonored;

Lex Mercatoria. Bills of Exche. & Promy. Notes.

The money, tho. he has received may be considered as received for the use of the owner of the holder of the bill, & as such he may recover it out of him. *Salk. 283. Vin. ab. tit. Evid. A. B. 56. Benc 1516.*

It has also been determined that, an acceptance is prima facie evidence of an account stated between the acceptor & holder, & that a balance to that amount, i.e. to ye amount of ye acceptance, appears to be due from the acceptor to the holder; for the acceptor is presumed to have seen how much was due to the Drawer, & by the acceptance he has agreed to pay the balance over to the holder. The holder may then declare in indisputable confut assent on an account stated, & the acceptance is evidence of it. *176. B. 239.*

Chitty, 191. 192.

With regard to the evidence by which an action on a bill or note is to be supported.

The evidence in these, as in all other cases, is governed as governed by the Pleading. That which is necessary, for the holder to allege in his Declaration is necessary, for him to prove in evidence. For as a general plea puts the whole in issue, he must prove the whole. He must state all that is necessary to his right of action, & prove it. But he is not bound to prove more, than what is necessary to his right of action, for he is bound to prove no more than he is bound to state. What is necessary for him to state you must collect from ye preceding rules.

Lex Mercatoria. Bills of Exch. & Promiss. & Notes.

It may be observed with some more particular
care, that the holder who sues on the Bill, must prove
the Bill was made - that the Bill is such an one
as is described or in its legal operation is the same.
He must prove the Defect. became a party to it -
for as it is necessary for him to state the Defect became
a party, so he must prove it. *Comp 600. Doug 667.*
3 T.R. 11. 335. 643. 4 St 471. 611. 1 Bos & Pul 7.

When the holder sues the acceptor, he must
prove the Defect. accepted by Bill, & if the acceptance
was by an Agent, that the Agent was lawfully
authorized to make it. *1 Esp R. 14. 15. Chit. 24. 200. 207.*

If the acceptance was conditional the plaintiff
in an action vs the acceptor must prove the event
on which it was to be paid to have taken place, or
the condition performed. *Sha 212. Comp 571.*

In an action vs the acceptor, proof of his
confession that he did accept the Bill is sufficient.
But this confession is no evidence in an action vs any
other party, He has a right to confess vs himself
but no 3^d person is to be injured thereby. *1 Esp R. 15.*
Sha 648. 1051. 12 Mod 309. 1 Esp R. 143. R. N. P. 136. Peck N. 16.

This rule indeed is generally applied to all
the parties. If an action is brought vs an Indorser, his
confession of his endorsement is good evidence vs him,
but in an action vs Drawer or other party this con-
fession is no evidence.

In an action vs the Drawer or Indorser, the
Defence. hand writing or that of his authorized agent must

Lex Mercatoria. Bills of Exchange & Promissory Notes.

also be proved. This rule is not at all peculiar to actions on Bills of Exchange; it is of universal applicability; for where a person is sued on a written instrument, the execution of it is to be proved. *S. Ray? 1376. 1542. Stra. 399. 609. 3. Mod 307.*

In an action ~~for~~ a party transferring a bill by mere delivery, the holder must prove the Deft did deliver the Bill to him - tho in general the production of the instrument is sufficient evidence that it was delivered until the contrary appears. *7 B.R. 64. S. Ray? 728. 6 B.R. 52. 12 Mod 244. 408. 521.*

And where the holder received the Bill under suspicious circumstances, it may be required of him to prove y^t he or some intermediate holder received it for a good & valuable consideration. Cases of this kind I have mentioned before; as where the Bill is produced by a stranger who has been lost by Deft. Now if it is proved to have been lost, it may be required of plff. to prove that either he or some intermediate holder gave a valuable consideration for it. *Barly 116. Chitly 9. 57. 124. 201.*

If an action is brought by an Indorsee as acceptor, or as Drawer the plff must prove the handwriting of the first Indorser, for otherwise he shows no title in himself. Suppose he brings his action as the acceptor & proves his (y^t acceptor's) handwriting, yet this proves no title in himself, i.e. that his Indorser was paid with his title. He must then prove the Bill to have been endorsed & he must prove it to have been endorsed by the Payee, who is the first Indorser.

Peake 20. 225. 1835 2. 180. 18 B.R. 654. Doug 650. 653. 3 B.R. 75.

Lex. Mercatoria. (Sills of Exch. & Prom. y. & Solis.)

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March 22^d 1812. Picture 15th.

I observed that in an action to be brought by the Indorser, vs the Drawee or acceptor the hand writing of the first indorser must be proved; for if the Payee has never indorsed the holder has no title to the bill. Further

Where there have been two indorsements, the first being in full, (i.e. not in blank) the holder must ^{prove} the second indorsement, i.e. the hand writing of the second Indorser, as well as the first in any action either vs that Indorser or the maker, or the acceptor, or any prior indorser. 176. Bl 606. y. Mod 87.

The reason of this is manifest. If you trace the progress of the Bill. It is made payable to A. or to A. & indorsing it in full "pay the contents to B." B. indorses it to C. Now A's indorsement not being in blank C. cannot fill it up by inserting his own name. He must then prove the indorsement of B. for no person can get a title but through B. A's indorsement must be proved to show that B. had a right to indorse, and B's indorsement must be proved to show a title in holder. & the same rule holds as to all the successive indorsements when they are in full. as if in the Example above C. indorses to D. in full, & D. to E. Now E must not only prove that A. indorsed it, but that B. C. & D. successively did for otherwise he does not deduce a title in himself. Though when the first Indorsement is in blank he need not prove the hand writing of the intermediate indorsers, for he can fill up this first (blank) indorsement with his own name. The hand writing is not proved

Sex. Annullaria. vius. Exch. Rom. v. fol.

show that the Bill was made a receipt, that, is, a different thing. But it is proved, for the purpose of showing a title to the bill in the present holder, upon the fact that he has signed, the first endorsement is in blank, it is not necessary to prove any subsequent endorsement, provided the action was vs him, or the drawer, or the acceptor, because being he can fill up the endorsement with his name, & he is thus relieved from the necessity of proving all the intermediate endorsements. In such case the holder causes the intermediate endorsements, which are in blank or in full, to fill up the first, with his own name, & then by proving the first hand writing he shows a title to himself. If however he would sue vs any, of the intermediate indorsers he must prove his endorsement & that of all parties prior to him. Bank of England v. Bell 11 B. & C. 343. 11 D. 176. 11 M. & C. 229. 1805 to 1806.

If a Bill is payable to a fictitious Payee or order, it is not necessary to prove any endorsement. The rule that regulates the rights & duties in such a Bill will point out what is necessary to be proved. In the nature of the thing there cannot be an endorsement. It will operate as a Bill payable to bearer & to the parties who name the Payee to be fictitious. It is impossible to prove an endorsement because there is no person in office who can endorse it. Such a Bill should be treated upon as a Bill payable to bearer - this is the most dangerous & inappropriate mode. The (Puff.) to be sure, may state the specific facts, that it was payable to a fictitious Payee and that it was

Lex Mercatoria. Bills of Exchange & Promiss. Notes

to him; the ^{2d} must know the bill to be payable to
a particular person &c. 3 T. R. 144. 1824 401. 1st. 113. 220. 334.
2 An. 194. 288. 118 203.

When the Drawer or indorser is sued, ^{1st} he must
prove that he used due diligence to obtain the money from
the acceptor or drawee. This is an excuse of him, &
if he has not done what the law requires of him he has
no right to recover on the other parties. They are to pay
if the holder cannot obtain it of the acceptor - their
liability is secondary. It is their implied contract, is
not broken if the holder has not used due diligence
to obtain the money of the acceptor or drawee. Com. H.
579. 5 Bar 2670. 1st. 45. 1st. 116. 712

3 on this due diligence on the part of the holder
or assignee his above consists principally in three things;
presentment for acceptance in some cases; presentment for
payment generally, and in either case i.e. of nonaccept-
ance or nonpayment, notice that the bill has been dishonored,
must be given to the party to whom he claims
within the time prescribed by Law. It follows necessari-
ly that when an action is not as ⁴ Drawer or indorser
on the Bill or note, in some cases as where a Bill is
payable such a time after sight, presentment
for acceptance. When this is necessary to be proved you
will see by referring to the former rules I gave on this
point. 118. 117. 1st. 116. 365.

4. the same principle when an action is
on the Drawer or Indorser the holder must prove pre-
sentment to the Drawer for payment and this is

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

regularly to be done whether the Drawee accepts the Bill or not. As this is a necessary part of the holder's duty to be must prove it to have been performed. 7 H. 11. 541. 2 Bur. 689. Falk 127. Stra 1007. 2 H. Bl. 170.

And in both cases, i.e. where presentment for acceptance is necessary or where it is unnecessary, and presentment for payment was necessary & the Bill has been dishonored, the holder must prove notice to the Drawee or Indorser when he sues them for it is a part of his duty to give notice and this notice must be given according to Law - it is generally to be given in a reasonable time, and what is a reasonable time is now well settled. 5 Bur 2670 1 D. R. 712. 1000 45.

And in case of Foreign Bills in an action by the Drawee or Indorser the holder proving notice to the Drawee must prove protest for non payment, & as the case may be of non acceptance. For in Foreign Bills, protest is a necessary part of the notice. 3 D. R. 993. 6 H. 11. 541. 2 D. R. 713. 5 H. 11. 239. 1 Falk 131.

But when it is said a protest is to be proved, it is not to be understood that any thing more is necessary or general than to produce the protest - for it proves itself. If it is forged the Drawee may prove it to be so. But prima facie the production of it is sufficient. Bull. 270. 12 Mod 345. 1 H. 11. 297. 1000 45.

I will barely observe however without going into detail that these proceedings required by the rules now given, on the part of the holder in suing or disputing with in certain cases - as where the Drawee

Lex Mercatoria. Bills of Exchange & Promy. Notes.

had no effect of the drawer, there no notice is necessary. But there are certain cases where the holder is excused for not presenting for acceptance. where notice in such cases is excused I refer you to the authorities laid down. where presentment is unnecessary it need not be proved. It was formerly held that plff. in an action as the Indorser must prove a demand on the Drawer or there is no need of it now. It is necessary to prove a demand for payment of the drawer, for his liability is primary. but it is not necessary when the Indorser is directed to prove a demand on the drawer. The liability of the drawer & Indorser is coordinate; there is no priority of liability in them, as between them & the holder, but there is a priority as between themselves. The holder may recover of the Indorser without making any demand on the Drawer, though the Indorser may have his remedy vs the Drawer to recover of him the same amount. So a 2^d indorser may be compelled to pay & then he may recover of the first Indorser or Drawer. See 4th Ed. 131. 133.

Must not sign? See 441. Com R. 579. 2 Bur 664. 1 Esp R. 334. not Dyer's.

If an Indorser having paid a Bill, sends the acceptor, Drawer or any prior Indorser to demand from him the Bill was returned to him, and that he paid it, for without proving this he shows no right to recover. If he has volunteered when the acceptor ought to have paid, he cannot subject 7th Drawer or Indorser to a new liability. The holder of the demand of 7th drawer. If then measure can be taken, & has been carried on, & has paid, he may recover of the drawer, parties. See 441.

Lex Mercatoria. Bills of Exchange & Money. 8. 10.

The rule is the same as to the Drawer when he sues the acceptor he must prove that the Bill was taken to him, & that he paid it. - If he has paid it voluntarily, he has interposed with the duty of the acceptor. *Id.*

If the Acceptor of the Bill sues the Drawer for the money he was paid, he must prove not only the Drawing & that he paid the money himself, or some thing equivalent, as if he were paid & taken in Execution, but also that he had no effect of the drawer in his hands, because the presumption arising from a simple acceptance is that he was indebted to the Drawer & had effect of his - & the onus probandi that he was ^{not} indebted, nor had an effect of the drawer lies on him. *3 Wils. 18. Rep 156. Chitty 6. 203.*

In the other kind, if the Drawer having paid the Bill sues the acceptor he must prove the acceptance, a receipt on the acceptor for payment & his refusal to pay - & also that the Bill was returned to him & that he has paid it. *10 Wils 36. 37 1 Wils 185.*

But in an action brought by the Drawer vs. the Acceptor the former need not prove that he had effect in the drawers hands, for the onus probandi that he had not lies on the acceptor. The acceptance furnishes a presumption that the acceptor had effect. This rule supposes the Bill to have been accepted simply - for if the drawer accepts supra, prole, the presumption of his having effect is rebutted & the onus probandi is shifted. *18. W. 456. 408, 50. 1. 127. 2. 76. 36 612.*

The case of *Wentworth v. Kelly* which is a leading & important case, it was determined as a rule of evidence by the Court in 18. W. 456. 408. 50. 1. 127. 2. 76. 36 612.

Lex Mercatoria. (Bills of Exchange & Promys. Notes.)

cannot be introduced to impeach it, even in an action
vs the other parties. As e.g. The holder brings an action
vs the Drawer, the Drawer offers an Indorser to prove
that the Bill was drawn ~~for~~ an insidious consideration.
Even if this be the fact the holder cannot recover of the
Drawer, tho of the Indorser he may. This question has
come up 2 or 3 times in Court: but has never been deci-
ded, it went off on some other ground. It has been set-
tled differently in the different States. I would propose this
as a *Qu.* for your discussion. The Auth. are 15. B. 300.
3 B. 36. 7 B. 332. Peck R. 6. 52. 224. 40. 1 Esp. B. 10. 85. 298.
1 Day 17. 301 1 Cairns 258. 267.

However this question may be, it is settled that
in an action vs the Maker of a note by the Indorser, the
Indorser is a competent witness to prove payment.
This does not go to impeach the validity of the note itself
and has nothing to do with the question above. It sup-
poses the evidence is consistent with the instrument &
goes in avoidance of it only. There is no objection to his
admission on the ground of interest. The rule is well set-
tled. (Peck R. 6. 52. 117.)

So also in an action vs the Drawer of a bill
where no notice has been given, the Acceptor is a com-
petent witness to prove he had no effect of the Drawer
& thus to show no notice was necessary to be given. There
is no interest here to exclude him. 1 Esp. B. 332.

In an action on a Bill, the Plff. must general-
ly produce the Bill itself, tho if it is lost & this fact is

Lex Mercatoria. Bills of Exchange & Promiss. Notes.

be proved or rendered probable he may introduce a sworn copy in direct evidence of its contents. This is what is called secondary evidence. The rules of practice as to this secondary evidence admit of a variety of qualifications with which I have here no concern. I consider them under the division of "Proper Doyer" in the title of "Pleadings". 2 L. Ray. 731. 1 Atk. 446. 158 p. 250. Park. 2. 165.

In an action vs the Acceptor, if he accepted the Bill after it was drawn, which is almost always the case, & had seen it at the time of acceptance, the production of the Bill is sufficient evidence that the Bill was drawn & dispensed with the necessity of proving the handwriting of the Drawer for the acceptance as above, amounts to an implied admission that it was the Drawer's handwriting. 5 Ta. 442. 648. 946. 3 Bur. 1354. 158 p. 290. 2 L. Ray. 444. 1 Atk. 127. 1 V. R. 604. 612.

If then the Bill was really a forged one, but the Drawer having seen it, accepted, this forgery cannot be proved to defeat a bona fide holder, in an action vs the Acceptor, because his acceptance has contributed to the imposition. He is supposed to know the handwriting of his correspondent, & when he accepts the holder puts reliance on the genuineness of the Bill. [Suppos if holder knew of the forgery at the time of receiving it. 3 At. 7.] — Same Auth. ut supra.

But the rule does not hold if the Drawer accepts the Bill without seeing it. no such implication arises as in the above case. He accepts on the supposition

Sex Mercatoria. (Bills of Exchange & Promissory Notes.)

that there is a genuine Bill, but does not undertake to warrant its being genuine.

The same distinction holds in an action on the bill; if he received a bill having been it, he cannot object to it as forged, to defeat a bona fide holder. *Idem.*

When a Deft. brings on a bill bringing the money into Court, he admits his own signature by that act. He admits himself liable to the amount of money he brings into it. — This proceeding amounts to a Tender & something more. 3 Burr 2639. 2 T.R. 275. 1 Esp. R. 347. — 1 T. R. 464. 2 H. R. 374.

When the holder brings on a Bill transferable, by mere delivery, the production of the Bill alone, is in general sufficient evidence of his title. There is however an exception to this rule where the holder took the Bill under suspicious circumstances, as when the bill was lost. In such case where the loss is proved, the holder may be compelled to show that he or some immediate holder received it bona fide & for a valuable consideration. *Chitty 209.*

Thus when a bill is made payable to bearer, it is not incumbent on the holder to prove, that the Payee endorsed it, or that any other person endorsed it for no endorsement is necessary. But where a bill is transferable by endorsement only, as where it is made payable to order, the holder must prove it. But where it is payable to bearer he need not even prove of whom he received it. His possession is in general sufficient

See. Howell v. Hill & Co. 10 B. & C. 101.

evidence of his own right to the bill. It is, in a fair
evidence. *Chitty, 200.*

If an Acceptor having paid the bill supra pro
test, sends the Drawer for the money, the acceptance su
pra protest is *prima facie* evidence that he has no right
of the Drawer in his hands. For this acceptance & pay
ment excludes the presumption that he has it in his
hands. *Chitty, 167. 219. 210.*

In an action on a Foreign Bill of the Drawer
or Endorser, the protest is sufficient evidence of present
ment & refusal. There is no need then of proving present
ment or refusal. The protest mentions both, and its be
ing made by an officer known in the mercantile world
imports absolute verity in itself, & full evidence is to be
given to it in all Courts of Justice. *Bayne, pt. 220,
A. N. P. 270. & T. R. 175. Whinn 272.*

Now independently of the observation that this
Protest contains verity in itself, & that full evidence is
to be given to it, &c. I would observe that there is a pec
uliar fitness in the Rule; for the bill being drawn in
one country & to be accepted in another, on refusal the
action is to be tried in the Court of which the bill was
drawn; & if the Protest was not evidence itself, the
holder would be obliged to procure witnesses, at that
great distance, or get a Commissioner to have deposi
tions taken, which is attended with much trouble, as
depositions not being allowed at all. Cannot be taken with
out a commission. This is one reason why this species of
non-official protest is allowed.

Lex Mercatoria. Bills of Exchange & Promy. Notes.

The production of the Protest does not dispense with the necessity of producing the Bill itself. The protest does not prove that the Drawers or Indorsers' handwriting was genuine. (I have already observed the cases in which the production of the bill may be excused or dispensed with, as where it is lost. B. N. P. 270. 271.

That a letter containing information that a Bill ^{which had} was put in the Post Office or left at Mr. Deft's house is sufficient evidence of notice of this fact. This evidence can not be let in without notice to Deft. to produce the letter on trial. & if produced it will speak for itself. If Deft. will not produce it, the plff. may prove its contents by a sworn copy or otherwise & that it was left at the Post office or at Deft's house properly addressed. 2 H. Bl. 509. Poth. p. 148. 1 Esp. R. 5. Peake R. 165. Peake Ev. 107 & onwards.

Thus far of Evidence. The only remedy I have hitherto considered is Assumpsit. I have a few remarks to make on another form of action.

The action of Debt will in some cases, i.e. as between some parties lie on a Bill of Exchange or Promy. Note.

That is debt or Simple Contract will sometimes lie for a Bill or note is not especially. The action of Debt or Simple Contract was formerly much used; but was afterwards disused on account of the wager of law the Deft. was allowed, & also because in this action the plff. was bound to prove the fact, & if he failed or he could not recover at all. The wager of law has now become disused & it has long since been settled that plff. may recover in debt if he can show the fact & the law. These difficulties being removed the action has lately been revived in Western instances.

Lex Mercatoria. (Bills of Exchange & Prom. Notes.)

Hall. It is not the ordinary remedy on a Bill or Note, but as between some parties it is one which may be had. 1 Bos. & Pul. 249. 2 B. & A. 1221. Doug. 6. 703 note. 1 H. B. 249. 500.

It has been held that debt will ^{not} lie on a Bill, in favor of the Payee vs the acceptor, because it is said there is no privity. 11 Wils. 185.

There is indeed no actual privity, the payee or holder may never have seen the acceptor, but yet there seems to me to be privity enough: his liability is primary. This proposition seems to be questionable, because the acceptance amounts to a promise to pay, & therefore I think there is privity sufficient. L. M. 88. Chitty B. 220.

It has been indeed determined that if money is delivered by A to B. & by him delivered over to C. that C. may maintain Debt vs B. for non delivery. There is no privity between B & C. This case is stronger than the one above. In that the Payee & acceptor usually do meet each other; in this by the supposition C. never has seen B. Cro. J. 687. Yelv. 23. 2 Roll. 441. 597.

There is no doubt but debt will lie on a Bill or Note as between the parties in immediate privity. For as to when the rule runs otherwise, that wherever the Common Law or Custom, makes a duty, debt will lie. I think this rule is broad enough to include the case of Payee & Acceptor. Paper. Bill. however that may be, it is seen that debt will lie between Parties in immediate privity, as e.g. Drawee & Acceptor - Payee & Drawer. B. Chitty 220. 221. Handb. 486 10th Ed. 38. Baile 74. note. Com. Di. "Debt". 4. Sta. 680.

Lex Mercatoria.

of Hollenay & Respondentia Bonds,
Charter Parties, Ship owners, Seamen, of the
doctrine relating to Partnerships and the Law as it
respects Factors distinguished from other Agents.

By Judge Hallam. March 23. 1812. Dec. 1st.

I shall make some introductory remarks before I enter
on the principal subject of Insurance.

It is the common style in the books to speak of the
Law Merchant, as the custom of Merchants. That was
a language formerly in use, but practice it was treated
as a custom. But it does not at all mistake of the nature
of a custom. A custom is the Law of a particular place
i.e. it is local. But the Law Merchant is not confined
to a particular place - it is the general Law of Com-
merce. Nations. A custom must be proved and the
Judges are not bound to take notice of it unless it is pro-
ved. But it is not so with the Law Merchant, it need
not be proved only from the Elementary writers & Author-
ities upon the subject. But proved as any fact, by the
mouth of Witnesses. The Judges are bound to notice the
Common Law of the Country, equally so are they bound
ex officio to notice the customs of merchants - and the
presumption that it is the Law is to govern like the com-
mon Law is shown - as by proving a custom.

The Law Merchant is a general Law, but it
may have Customs, & these are like customs at home.
What the Common Law is to any ^{particular} Country, is liable to

Lex Mercatoria.

particular customs varying from the general Law, the Lex Mercatoria & the Lex Mercatoria. It has many customs in different countries, & is regulated by the rules in each country. It is in all countries the same. Merchants may be called by Legislation, & it, as it respects that country, where there are more ordinances by the ruling power, than the Sovereigns that alters the D. M. as to that country. In such cases the common D. M. if that country is different from what it is in the other countries, will.

There is no propriety in calling it the Custom of Merchants only, that in some respects differs from the Common Law. I repeat, a custom is to be proved as such, that the judges must take notice of the D. M. for it is as general as the C. L. & is to be proved by authorities the same as the C. L. It cannot be proved in any other way any more than the same relations can be proved by suppositions. Whenever there is a custom in the D. M. on a particular place different from the general D. M. that custom must be proved & the general D. M. will prevail. As e.g. if a party would plead himself of the custom of Loughborough where said in the C. L. of Loughborough that on a contract which was made in Loughborough, he is bound to prove it, else no notice will be taken of it.

I will now mention on what respects the Lex Mercatoria differs from the Common Law.

There are certain points on which the D. M. differs entirely, in its principles from the C. L. When I speak of the Common Law, I mean the C. L. of England & our country, so far as it is not altered by provisions of our own.

Sec. Herrent.

Now it is a remarkable principle of the C.D. Eng^l and of this country too (unless in some States where they have improperly altered it) that where two persons are joint tenants of property either real or personal, & one dies, the joint tenancy is severed, the right of survivorship takes place. You will observe the point of joint-tenants, and not of tenants in common - as to the latter there is no such case. Either of the joint-tenants might sever the tenancy whether it was of real or personal property in his own lifetime - and as long as they hold jointly, & one dies the joint tenancy remains severed. We have no joint tenancy in common. the we have no Stat. on the subject. it is by usage. In some of the States they have abolished it by Statute. As you state they have gone so far as to say that there shall be no right of survivorship unless the conveyance expressly mentions that it is to be a joint tenancy. This joint tenancy is wholly unknown in S. M. As to joint tenants, & it does there is no joint tenancy. As to shares after payment of debts &c. goes to his next of kin representatives &c. in any other case. I only mention this as an example. As to the right of survivorship takes place in all cases, except as to the Stock of a Steam, where two persons have been joint partners. This is a solitary exception.

Another thing in which the C.D. & S. M. differ is this - Fraud is void by the S. M. in some respects if jointly done what it is at C.D. As to fraud in the consideration of a contract does not avoid it. You are entitled to your recompense in damages by the S. M.

Lex Mercatoria.

Suppose a man is cheated in the sale of a Horse, now the property in the Horse is in the purchaser. The contract is good & if you have given your Note you are liable upon it, & cannot defend it on the ground of fraud in the consideration. To be sure you are entitled to your action in Damages & this is all. But on the other hand, if the fraud is in the Execution you may impeach the contract for it is then utterly void. This is where a man enters into one contract when he knows he is entering into another. E.g. on a contract with a blind man, he agrees to sign a note for 50 £ & you give it up with 5000 £ & he signs it. This is fraud in the Execution, the 50 £ is utterly void. He signed a Note for one thing when he supposed it was for another. But if you agree to give 5000 £ for a tract of Western Lands, which were represented to you as fine, level well watered land when in fact it consisted of a heap of Rocks & Laurel Hills you cannot avoid the contract, this is fraud in the consideration. Your ~~only~~ remedy in such case is in Damages. Again one step further. The Law is a C. of Chy. is the same in both cases. With respect to personal Contracts, if there is fraud Chy. will not interfere, but leave the party to his remedy in a C. of Law. But if the Contract is respecting Real property & there is fraud Chy. will interfere & rescind the Contract, as in the example above of the Western Lands. Then Chy. will rescind the Contract provided the lands were returned. They say the contract is voidable. So that whenever there is a fraud in the consideration of a contract at Law the contract stands & the remedy is in Damages.

See *Mercurius*.

If the fraud is in the execution the Contract is void. If the Contract is about Real Property, the lot of Chy' can rescind it. But in D. & Co. any fraud vitiates the Contract, whether it be in the Consideration or Execution, any concealment of facts which in honor ought to be disclosed vitiates the Contract. This goes further than mere Sine Frauds, as saying - that any Contract entered into, in which there has not been a fair & full disclosure of every circumstance, which would have had an effect on the Contract, or might possibly have prevented its being entered into, renders the Contract void. You cannot avail yourself of any circumstances within your knowledge & not known to the adverse party - and there must be no equivocation, or Mental Reservation - if there is, the Contract is rendered void. As Suppose you wished to get a Ship insured & the general impression was that a Declaration of War would be made & you procured A. to insure her, and he at this time was ignorant of the fact, & you did not inform him ^{that knowing it} of it - the policy is void. If you had like wise been ignorant of the Declaration of War, the Policy would have been good. But the distinction as to this subject is, that a man is not bound to disclose his own political Speculations, but fairly he is bound to disclose. These Speculations are as open to J. C. Anson as to you. If you were to go to an Insurer to get a Ship insured on a voyage to India, you are not bound to inform ^{him} that at certain seasons of the year the Monsoon winds blow, for the Insurer is presumed to know all this already; -

But

Lord Mansfield.

and then must be a revocation of fault or any positive declaration. I suppose your ship has been out for six months, & you expect her return to mortgage, & you go to an insurer to get her insured & tell him you have heard nothing of her for six months & he insures her, & you had previously heard by another ship that they had left her in a very dangerous situation all hands at the pumps &c. only barks before. Here the contract is void.

So at L. it is impossible even to let a man under an obligation so as to make him liable in an action for any Courtship you may have rendered for him, unless there may be a case where the law

imposes a duty on a man if he should neglect it & you perform it for him he can be made liable. If a man turns his wife out of doors & you support her, or if he is so cruel that she or his children should be compelled to fly from him, & you support her or them, as in either case it is the duty of the husband to support his wife & children he may be compelled to pay you for performing his duty. But suppose you should let a man borrow a man's property, which you purchase, and the law says the owner under no obligation to pay you for it, & therefore you cannot by this action compel him to pay you for your trouble. A common example is, 800 is when a man's servant was going on an errand, & he was arrested for a debt he owed, & a person bailed him upon the supposition that the Master would be no worse off if he suffered any damage. & on this was a common Courtship, & however kind the principles of

Sex. Memoranda

hence, I have not, might call for the master, to bear all the
loss yet at I am he cannot be subjected. If the Master
had requested it, an action might be sustained for him,
but as in the above case there was no request no recovery
could be had for him either in. I am a party. But it is not
so in S. M. & I could say, done for another will bind the latter
to pay a reasonable compensation; i.e. if a man should do
work for another which is for the benefit of the latter, even
without request the latter is bound. As where a Bill is paid
for the honor of the Drawer. This subject has been treated
& it is unnecessary for me to repeat the Law. I am the
Drawer would be bound as above, & the case is the same
in every mercantile concern, as if property is in danger
of loss in a harbor, or saved from a wreck at sea, the
without request from the owner, still he is liable to pay
the value of the cargo. . . Secus at C. S. . . And if y. S. M.
were not as it is, much property would be lost or dis-
troyed because no one would volunteer their services in
a time of danger without a prospect of recompense.

I forgot to remark in treating of fraud in
the consideration that in Conn. we have interwoven the
S. M. with ^{our} the C. S. . . If the fraud is clear & we
nullified the contract is void & the party, in any place,
jailed. As e.g. you were well acquainted with S. S. B. &
Kobbs, & frequently wished to purchase him, & Stiles comes
to you & tells you, "you may have my horse at the price
you offered me for him", & you pay him the money without
going to inspect the horse. & the fact is Stiles has sold
you a dead horse. This is clear fraud & in Conn. the cont. is void.

Sex. Mercatorica.

Another thing in which S. Mo. differs from C. S.
At C. S. if you have a debt vs two or more, & pay joint debt
or, & you imprison one & voluntarily release him from pris-
on, without any security for the debt, it operates as a
release to both or all. There is no sens. in this rule
I grant, but it is an established principle of C. S. It is not
so by S. Mo. By the S. Mo. if you imprison one & have
a good security vs another, & find that you cannot ob-
tain your debt of the one you have imprisoned, as if
he is a Bankrupt, you may release him, & then pursue
your remedy vs another, & imprison him, if he will
not pay without. It is no objection that his obligor
has been released. The first decision on this point was in
1799 & it was a mistake, no doubt. There never suppo-
sed that according to C. S. the release of a man from
prison was a release to him of the debt. You may
release him if you take a security, but why should
it discharge him when you find he is a Bankrupt (C. S.)
unable to get your debt & you release him from
prison. I suspect it arose in this way. I speak of a
Release properly so called when it is executed under hand
& seal. Now if A & B. are joint debtors to C. and C. releases
A. B. of course is released. for the release furnishes a pre-
sumption that C. has received his debt of A. Now when
one is turned out of Jail this is called a Release. But the
two releases are not at all similar. They are both termed
releases, & by a syllogism they may be made out. But
they are not the same. The latter is not a Release
properly so called. Super

Sex. Mercatorum.

Suppose a debt. suffers a voluntary escape, this is called a Release & the debt is never after satisfied by the prisoner. If they say if a Creditor releases a debtor from prison, this is a voluntary escape in the Creditor - it is not so. The debt is bound by his oath & the law to keep the prisoner in prison, if then he releases him he breaks his oath, but when the Creditor releases him it is different. The two cases are not at all similar.

The principles of S. M. appear to accord with common sense & reason - the Creditor may discharge one from prison & pursue another. See at C. D.

Another small difference is - the C. D. knows no thing of Calendar months, but S. M. computes by calendar moth. Again if the time of fulfilling a Contract happens to fall on Sunday, at C. D. a tender on Monday is sufficient, because the obligor is not bound to tender before the contract becomes due. But by S. M. which aims at great punctuality the tender in such cases must be made on Saturday. The difference in this respect arises from the greater punctuality required by the S. M. in commercial concerns.

At C. D. a chose in action could never be sold. It was a species of offence to sell legal claims - but it was not so in equity, here the claims of the purchaser were protected, but the Suit was still to be tried in person of the original promisee, & of course he might refuse to release or discharge the promisor. As e.g. a bond was given to A. & he assigned it to B. now when B. sued upon it, he was obliged to bring the action in the name of A. & not B.

Lex Mercatorum.

would at any time release it. But Equity says you have not discharged the Bond, you have sold your interest, and have no right to release it. And the also says to the obligor you shall not pay the money over to the original obligee. So far goes Equity. But by the C.D. every mercantile Instrument was negotiable, (though some say from promissory notes were made negotiable by the Stat. of Ann. I think the Stat. was only in affirmance of the C.D. M. i.e. that P. Notes payable to Order were negotiable by C.D. M. I have always viewed the arguments of Mr. Chipman (of Vermont) in a little treatise of his, as conclusive, viz. that without the Stat. notes payable to order were negotiable. Whether the Stat. of Ann. made our Law as affirmed the old does not concern us here. It is however generally believed that Promissory Notes were made negotiable by that Stat. In Conn. we never supposed a P. Note could be sold till a late Stat. was made allowing it. At C.D. choses in action, never can be assigned so that the assignee has the legal interest, but Equity will interfere & protect him *ut supra*. But in S.M. the suit may be brought in the name of the assignee.

At C.D. when you have sold us a man & he gives you an order as e.g. A owes B. a sum of money & B. calls on A for payment. A says I cannot pay you the money, but if you will take an order on C. he will pay you - now if B. agrees to take this order & C. will not pay him, A will be compelled to pay, provided B. gives notice of C's refusal. But there is no express law of notice necessary. In S.M. the principle is the

Lex. Mercatoria

same, but the notice must be given in a particular manner, as thro' the medium of a Notary Public &c (see "Bills of Exchange"). If the party has not this regular notice, tho' you can prove he knew the fact, still notice is considered as wanting & he is not bound.

Again at C. D. in all contracts not sealed, you may go into the consideration, & show there was none. But if the contract is sealed it is otherwise - it is then a Specialty. But by the S. M. it is different. If the instrument has been negotiated, you never can go into the consideration, tho' it was only in writing & not sealed. He has when negotiated all the privileges of a Specialty, as e.g. an accommodation Note. It is a very common thing for a man to give a note to another for the purpose of enabling the latter to raise money. (By the supposition the note is given without consideration.) Suppose A. gives B. such a note - now B. can sell it. But suppose B. instead of selling it pays A. on the note, B. cannot recover one farthing. But if he negotiates the note to C. A. can never question the consideration in an action in favor of C. or any subsequent holder. But as between A. & B. the promise is the original contract, A. may defeat a recovery in B.'s favor on the ground of want of consideration.

By C. D. when you make a purchase of a man, & the bargain is closed, the property vests in one & the money in the other. E.g. A. says "B. what will take for your horse?" B. says "100^l." A. tenders the money & B. the horse. The horse & money vests, & neither of them alone can destroy the contract. But in Mercantile concerns there are cases where the

Lex Mercatoria

Bargain is complete & yet the property does not vest in the buyer until that the seller may keep the possession of it. e.g. A goes to Mr. B. & purchases a set of goods of B. but then catches down, mended & packed for him, & also gets B. to charge them to him. Now at C. D. the Bargain is closed. But after all this B. gets information that Mr. B. Bankrupt. Now says Mr. B. may stop these goods that packed to in transit, if they have not gone out of his store. or if they have gone out of the store in case A has them in his possession. He may stop them at any time before they are assigned to a 3^d person. Du. can he do this without process? &c. This is what is called stopping in transitu. There is no such thing known at C. D. I have now finished my introductory observations and shall proceed to the subject of

Insurance.

A contract of Insurance is generally entered into to indemnify one in certain events to which he or his property is exposed, as fire, water &c. But still the contract would be an insurance even tho' not so fully, provided it was to depend on the happening of an event, as on a birth or marriage. It is at most a contract of insurance to insure a Lottery ticket, Birth, or marriage, as to insure a Ship. -

The person insuring is called the Insurer, and sometimes the Underwriter. The other party is called the Insured. Some say it is improper to insure a Premium upon the life of the Policy. It is not so. The consideration paid is called the Premium, and the instrument which

Sea Mercantile.

into a valid Policy of Insurance. No other terms need be mentioned at present.

It was formerly a common practice to insure on every kind of event, such as Marriages, Births &c. on which they had no kind of interest. - it was also a common practice to insure Ships on which the insured had no interest. This opened a door for wagering - it was a wager, and wagering was extremely detrimental & injurious to commerce. This was not the object of insurance. In Eng.^d by Stat. . . . a stop was put to all such wagering contracts. The Stat. declares that all the insurance is utterly void unless the party has an interest, in a Ship &c. An important Question arises whether these contracts were not void without Stat. - I believe myself it is the opinion of most persons, & in almost all countries that such insurance was void by the common law without the aid of any Statute. The Question arose in this way. In Eng.^d common wagering contracts were held good & laid the foundation for action - now it was asked, why not allow a wager concerning a Ship? Wagers on Ships became very frequent, & were the source of much litigation. The use of insurance was to divide the loss. But it was not useful to encourage a man who had no interest, to insure, & therefore a Stat. was made prohibiting it. I must say I think such contracts were void in all countries where no such practice of allowing wagers obtained. The laws of every Country say that such wagering policies are void, as in the *Principe de la Mer* &c. & a wager of any kind is of no use to the parties.

Lex Mercatoria.

they are all as sound policy, and I do not believe the D. L. is so contrary to the L. D. as that by it gambling policies would be allowed. Be this as it may is, whether wages can be recovered or not. There is no doubt but that the English Statute is an affirmation of the L. D. of Nations. If commercial insurances of this kind have gone out of use in that country & have never obtained there. If they should ever be attempted, I hope our Ls. will always prove against them.

Insurances as to fires - and with respect to seizures - for the parties have an interest.

Lecture 2nd March 24th 1813.

What Persons may be Insured.

There is no question but what every person, whether a citizen or Alien, may be insured, except an Alien Enemy. Whether the Property of an Alien enemy during a time of war can be insured, so that the insurance is valid, has been a subject of conflicting opinions in Eng^d. But it is not a Dec. in D. L. It is ruled by the D. L. to be illegal & not binding on the Insurers.

Some eminent characters in Eng^d thought it good Policy to allow such insurances, because it assisted Trade - & they got the Premium, & as the Insurers made money by it, it was thought beneficial. Others thought otherwise. The Que. was, what was the Law? No doubt many Alien enemies had recovered of English Insurers. No Dec. was made on this point - and the thing passed along sub silentio. Still there was no decision on the subject. Saying such insurances was singular. Mr. Mansfield was a great deal of time in making a decision.

Lex Mercatorum.

settling the doctrine, but chose not to give it himself. It never was decided.

In 1748. on the breaking out of the war as Stat. was made forbidding it, as bad Policy. And because this Stat. was made forbidding it, it is said it was lawful before. The case with us is different admitting it to be so. We have no Stat. in the U.S. forbidding it. When our Ancestors emigrated they brought with them the English Customs, & adopted their C. D. But with respect to the S. M. it was different. We are to enquire what the S. M. is on the subject. We shall, I trust, find no Station, but Eng.^d who ever held that such insurance was good, & in Eng.^d there was no decision upon the real Qu. whether such insurance was lawful or not. When that war was at an end the old practice was revived. Insurances of an Alien Enemy's property were made, and where a loss happened the Insurers paid without any Question. In the beginning of the present war (with France I suppose & F.) a Stat. was made declaring that such insurances were illegal. Marshal D. 31. Pick 242.

Notwithstanding the Courts have never decided the Question directly, yet they have decided in another way or on other grounds which show that it is useful & endeavor to maintain the doctrine that such insurances are legal. The principle is you cannot maintain an action on the contract allowing it to be void & good. They have decided that no Suit can be maintained against an Alien enemy in time of war. This is universally admitted. It would be bad Policy, for it would be withdrawing

Sex. Mercatorii

property out of the Country, to enrich an Enemy. The Ins.
was attempted to be raised in a case before S^r Mansfield
(10 T. H. 84). The action was brought ^{vs.} by an tenderwriter, to re-
cover the Premium. it was not paid. The Ship was in-
sured. a verdict was tried in for the Ins. & he recovered the
Premium. Defend. moved for a New Trial on the ground
that the insurance was illegal, as it was made on
an Alien Enemy's Ship. But it was not granted. it
was insured as a Neutral vessel. They wished to show
the property belonged to an Enemy, but S^r Mansfield re-
fused to admit the proof of this, because on the face of
the Instrument it appeared to be Neutral. & properly
of course the Ins. (as to legality of insur.) was avoided
and not decided in that case, tho' I see no reason why the
evidence might not be admitted.

So in a case that came up before S^r Kenyon,
(6 T. H. 23.) - This was a Policy entered into in time of peace.
Of course it was a valid contract. But before the Ship
sailed war was declared. The Ct. C. do no otherwise than
determine that the contract was a valid one, but they
held that no action could be maintained upon it be-
cause the Ins. had now become an Alien Enemy.
On this ground the Ins. failed. This did not go at all to
decide the Question, but went to show that as long
as the war lasted he could take no advantage of the
Policy. & on this is considered a principle more impor-
tant than the rule arising from prohibiting an Enemy
to maintain an action when the respective Countries
the Parties are at war with each other. It would not be
just.

Lex Mercatoria.

useful sometimes to allow an action to be maintained as Suppose the case of a Ransom Bill. e.g. A Ship is taken at Sea, & the Master ransoms her for 10,000 £ . She may be worth 20,000 £ but the Captors are willing to take this rather than run the risk of taking her ~~etc~~ ^{etc}. Now it is advantageous to alleviate the miseries of war, that this contract should be binding & a recovery be allowed upon it. But no principle ~~was~~ ^{is} warrant a right of recovery in this case, and no nation but Eng. ever allowed a recovery on a Ransom Bill, and they suffered it sub silentio. Other nations take hostages from the Ship of the Captured.

In a Manuscript case I have seen L. Mansfield decided that no action could be maintained on a Ransom Bill. In another case (3 Bur 1784) L. Mansfield held that a contract made in time of war was valid the action being brought upon it after the restoration of Peace. This opinion goes as far as this - that no contract made before or during the War can be recovered upon during the War, - but in ^{the} ~~either~~ case a recovery may be had after peace is restored. But this is not the Law of Nations. This decision would embrace an insurance if there was no Stat. The action cannot be maintained on a contract made before or during the War, while the War lasts - But the Law is contrary an action be maintained on a contract made during the War & sued on after a Peace. It is generally true, that a recovery cannot be had on such a contract, for it is voidable. But there are Exceptions to cases of this kind which are

Lex Mercatoria.

admitted, & why should not the Hanson Bill be so? It is different from young to trade with them - their injuries. But it is essentially useful to allow them the same B. B. & it is the opinion that this ought to be an exception, I agree with him.

But there is an established exception standing on stronger ground, e.g. Suppose there was an Englishman in France at the time war broke out, & he had property there. May he not bring it away? Yes. May they not insure it? It is my opinion they may, & if his property consists in B. B. & C. not being a gift of property, may he not sell it? Yes, he brings these before the war was declared. He could not go from Eng^d there after the war than these privileges. This depends on the various plans of the Party & the necessities of the case.

With respect to the contract of insurance I am. I am every way in my opinion whatever may be the opinions it is void. But with respect to the B. of the Hanson Bill it is wholly different. Though you cannot in fact insure upon it during the war, yet it is a contract of necessity, it is useful, & does not partake of trade, and therefore in this & all other like cases the contract sh^d be considered valid.

It has been decided in 1816 that an action could not be maintained on a contract of insurance entered into after sailing of a vessel & a vessel had been captured, but before the declaration of war, the said action after the restoration of peace.

Another Dec. has been made on which I find no authority except the right which neutrals are allowed. It was this after the Dec. had settled the point, that there could be no insurance of an enemy's property, whether the property

Lex Mercatoria.

of a neutral residing in an enemy's country, domiciled there, could be insured. The case was this, An American went to France, resided there, but did not take the oath of allegiance, he was not naturalized. In the time of the war he got his property insured on Eng. & then the Gov. came up whether this was to be considered as enemy's property. The Ct. decided that this case was not within the meaning of the Statute, & certainly it was not within the letter if it was no injury that his property sh^d be insured. The objection came up in the strongest manner, for he was in partnership with a French citizen - but by the Policy of insurance it appeared it was his individual property, his own share only which was insured, & not the Frenchman's property. 6 Ct. R. 413.

The amount then is, that the Contract of an enemy shall not be enforced, altho there is no doubt but a recovery has been had on a contract made during war, i.e. after the close of it. So that the contract was not considered illegal, as in case of a Hanson, & this was correct owing to necessity of the case - tho' on a contract of Insurance no recovery will be allowed. The reason of the distinction I have explained - it is founded in policy.

(1) Who may Insure.

We here independently of the Eng. Stat. with which we have nothing to do, as we have no similar Stat. in U.S. any Company as well as any individual may insure. A. may insure 10000^l. to 5000^l and to 500^l & they are liable in proportion. Any individual may insure. The change made in 1793 does not affect individuals, they may insure as formerly. But they have at last taken away the privilege of insurance

Lex. Cantabrig.

from all Companies except two which I think are called the
General Exchange & London Insurance Co. This monopoly has
in great incomes. ^{Notwithstanding the great quantity} The reason was, that these Co^s were poss-
essed of large Capitals, & it was dangerous to allow small Co^s
to insure, as they might often become bankrupts. No other Sta-
tes has ever granted such a monopoly. The Stat. vesting the
right in these two Co^s was made in 1780, leaving it open
for individuals to insure as formerly.

As to the manner of Insurance. If you go to a Co. to get insur-
ed, they insure us a Co. But when Individuals insure they sub-
scribe their names for such a sum, each one for himself.

In this Stat. there have been some Cases. Some
States some of them for the sake of the principle, others have
nothing to do with the Stat. itself. e.g. A & B. were traders
in Co. It was the ostensible trader & B. a secret Partner. A
expired & a loss happened. No doubt, but A & B. insured for him-
self individually - but on the happening of the loss he called
on B. to pay his part of the Company insurance. B. refused
on the ground of its being vs the Stat. & was illegal. The Co.
decided that A & B. not recover of B. The Law is not strict
to a first a person breaching it. A was compelled to pay
the whole. So if B. had paid at his part, the Law for the
same reason would lend him no aid to recover it back
again. 2 H. Bl. 379.

Another Case. A & B were Partners, as in the above
Case. A insured & a loss happened. B. honestly paid over his
Share of the loss to a Broker who was to pay it over to A. - A.
sued the Broker to recover the money out of his hands but
the Court decided he could not maintain his action. The Law

For Mercatorem.

waite and he said for he could not have recovered it, and therefore they held that he should not recover of the broker. I think ^{this} is carrying the principle too far. The Broker may be considered as the Agent for both. If B has paid to A, he will not recover it back again. And if B recovers of the broker after he has paid him the money, not because the Broker has any right to it, but because the Law will have nothing to do with any of them. In short.

In all these cases the Insured can recover of A. He cannot take advantage of his own illegal contract to defeat the insured of his right. The principle is, no man shall be allowed to make use of his own turpitude or allege it to defeat the recovery of an innocent person. Stat. 405.

On what this Insurance is to be made.

The Ship is the principal subject of Insurance. The goods & other merchandises may also be insured. The Freight, or what the Ship will carry, may also be insured; and so may Bottomry Bonds. I will here just observe what is meant by Bottomry Bonds. A man (without capital) is wishing to trade, & goes to a wealthy merchant (or other person) to borrow money, & it is lent to him on Bottomry Bonds, which is, if the Ship returns he shall have his money restored to him with (say e.g.) 50 per cent. & if it does not return he loses all. By this means one without Capital may trade. It is not usury for there is a hazard, a bona fide risk.

Now the lender of the money may himself be insured, i.e. he may go to an insurance office & insure. This is what is meant by insuring Bottomry Bonds. He insures altogether on the voyage whether he is a loser or gainer.

See Mercatoria.

There are articles which cannot be insured. If they cannot be legally insured, of course the insurance is void, & no recovery can be had. The first principle, then, of the case of smuggled goods, by which is meant the importation or exportation of goods forbidden by law to be imported or exported. e.g. wool in England cannot be legally exported. I do not mean here prohibition by Embargo. But in almost every Country certain articles are prohibited by Law from being imported or exported, this constitutes a policy. The insurance then on any of these prohibited articles is void.

It has been made a question whether the Insurer or would not be liable to the insured, if he knew the goods he had insured were prohibited by Law. As if A. goes to B. to get certain articles insured & B. knows they are forbidden, would B. be liable? No. It has been settled that he is not liable - for all illegal contracts should have a hard time laid upon them. They should be suppressed, and for this reason if A. has paid the premium he could not recover it back. In Com. 5343. all these points are settled.

There is another point of great importance, & because there are different opinions upon it. I have not a copy to know what is the L. 11. on the subject. It is this. Whether an Insurance on goods in a foreign Country where the goods are in such a place as would be to be unlawful, would be good; or in the words whether the Insurer will be liable to pay on an insurance of goods in a foreign Country where the trade was known to be unlawful. Some writers say it is not a breach of morality, & therefore ought to be discouraged. There are different opinions upon this point.

Sex. Mercatoria

But the English Authrs. have settled the doctrine that such an Insurance is not void. They go on this ground: that one country should not interfere with the internal regulations of another. So the Southern Nations have said. So does a writer mention that it is so in Russia, Sweden & Denmark. The French & Italian writers say to the same effect. All that is to be found on the subject is in Book 2nd, in the case of *Blanc & Tillet v. Baring*. The Eng^l in Eng^l considered that they ought to pay no regard to the Revenue Laws of another Country & that therefore the insurance was not void, the made contrary to the Laws of the Foreign Country. I am at a loss to say what in this is the general S. M. or not. I think it would be more honorable to pay some attention to the Laws of the Foreign Country & treat such contracts as unenforceable. It would be pleasant if a Country like this c^d be established between countries - the of the greatest commercial Nation in the world (Eng^l) will not consent, it cannot be expected that others will. Eng^l has established this rule & for our own defence we must adopt y^e same principles.

Insurance on articles, during a War, whether contraband of War, is an illegal insurance, & the contract not binding. As e.g. there are 2 Belligerent Nations. Neutral Nations have a right to carry on a trade with either without molestations except in certain articles, forbidden by the Law of Nations. These articles are called "Contrabands of War." It has been a law in Eng^l how far this right of Neutrals may be exercised by them, as in repelling Insults - If they are strong enough they will

Lex Mercatoria.

not sometimes put up with any thing. Power is with them. Law, & Justice. Britain has because she had the power broken over the Law of Nations in many instances, & other nations have done the same. But still there is a Law of Nations which gives the Belligerent or Neutral a right to complain, if it is violated. There are many writers on this subject & they generally agree about what articles are contraband of war. The principal writers are English, French, Swedish, & Hollander, & they all agree. Articles contraband of war, are Arms, ammunition, & warlike stores of every kind, and every thing necessary to the equipment of a Navy as Tar, Turpentine, Moulds &c. No Neutral can carry these in time of war to a Belligerent. They are always liable to be seized & condemned. It is an instance on these articles is illegal as contrary to the Law of Nations. There are some articles which at some time are contraband of war, & at others not. as at certain times Horses are not contraband of war. They are inhuman animals, as much so as Sheep - but yet they may be contraband, as if the Enemy want them to mount their Cavalry. It depends on the circumstances & nature of the case.

As Provision contraband of war. It is settled that in ordinary cases they are not; the one French writer on speculation upon the subject says they are. It is not so. Humanely speaking that provision is to be carried to a people the Enemy do make use of them. See Violins Book Chap. 7. Epitomized in 3rd vol. l. c. 7. & is of as high authority as any modern writer on the subject.

Six Mercatoria.

Now all this matter may be regulated by Treaty, & if so, "that we are to look if the Treaty allowed it, the insurance is good & if the property is taken it is a violation of the Laws of Nations & the rights of neutrals. I have hitherto been speaking of cases independent of any Treaty. But the Law of Nations is always subject to alteration by Treaty. The Law is thus regulated between them & they cannot affect the rights of 3.^d persons, or rather 3^d Nations.

Certain articles cannot be carried to a Bill of Lading, by reason of something which has taken place; as if there is a blockade or siege of a place, property going there is liable to seizure; but from this it does not follow that the Insurers are cleared. In cases of articles contraband of war, these are all known. But in this case of blockade, the parties may be wholly ignorant of the fact. The insured may not have the means of knowledge because perhaps the notice of the Blockade may not have reached him. If the insured knew that y.^d Port was blockaded & did not inform the Insurers, he cannot recover on the Contract of Insurance. But when he was ignorant of it, it is otherwise. If the Port is blockaded after the insurance is made, & any loss happens, the Insurer is liable. To be sure the Ship is not liable to ^{by the Law of Nations} capture, until after notice of the Blockade has been received; She should in the first place be sent back, but if after this she attempts to get into Port & is taken, the Insurer is not liable.

If both Parties know of the Blockade at the time of entering into the Insurance, no recovery can be

Lex Mercatoria.

had it is in such case an illegal contract. With respect to Blockades or Sieges the doctrine has long since been settled. You must avoid going there. But it has long since been established that particular ports might be declared to be blockaded, tho there was not a ship near it. This principle has been admitted *sub silentio*. e.g. The Eng^l declared the Port of Bust in a state of blockade, without keeping a ship near it. No doubt but this is an infringement of the right of neutrals. But they have allowed it, or rather they have been silent on the subject. From the acquiescence the Nations of the World have evinced to such a blockade, it has been extended to whole Coasts. And why not allow it? It is on the same principle: that there is no actual blockade. It is said there are no Auth^s vs such blockade - that is true - but the reason is that writers on subjects now or contemplated such a thing. When speaking of blockade or sieges, they speak of an actual blockade or sieges. This has grown to be an evil misleading convention.

With respect to the next question, which is the right of Search, I have to remark that it is in vain to oppose it on abstracted理由. If there is no right of search where is the benefit of the Law vs contraband goods. Admitting then Law, the right of search must be allowed of course, & have all commercial Nations will have it so. If by the Law of Nations Arms ammunition &c. cannot be carried to an Enemy's port, & the right of search is prevented, they will always be carried. This right of search has always been admitted.

Sex. Mercatoria.

there are usually Treaties regulating the manner in which it shall be made. Ballin. Ch. 7.

Carrying any of these contraband goods, by a citizen or subject of one Country to their Enemy's Country, is Treason. - If a Neutral carries them to a belligerent, it is no offence in him; he runs the risk of being taken, but if he is fortunate enough to get in, it is no offence. The insurance however is void. Ships of War cannot be searched, - it is owing to the dignity attached to their character. If then a Neutral carries on a clandestine trade, in contraband goods, with a belligerent ^{in these ships of war} the injured Nation has no redress except by declaring War. It is however an infringement of the Law of Nations.)

Insurances are often made vs Embargoes in Foreign Countries, or any restraint imposed by them. Such insurances are good. But an insurance in the Country, where the Embargo is laid, is void, & the Insurers are not liable, - for it is illegal. No person can insure vs an embargo of his own Nation but vs foreign Embargoes he may.

The Supreme Power of a State have the right of imposing or laying Embargoes. They have always this right. In Eng^d the King has the right of laying an Embargo, in time of war by Proclamation - not in time of peace. And in time of war he can lay it so that it can continue only till a meeting of Parliament. Park 234. Doug 254. Johnston v. Fulton?

Lex. Mercatoria.

Lect. 3^d March 20th 1810.

Commerce of any kind with an Enemy is unlawful. Of course an insurance on such commerce is void, & not binding on the Assurers. I hinted yesterday what I supposed might be an exception to that case. There are two decisions directly opposed to each other in the result, but not in principle. The Ct. determined in one case, that it was trading with an Enemy. 1 Bos. & P. 345. In the other case the Ct. considered it a matter of necessity. I conclude that both cases go on the ground that trading with an Enemy is not admissible, & of course the insurance is not binding. Suppose the Question is this. A purchases goods in an Enemys Country in time of War, but he was residing there in a time of peace, & was in trade & had debts due him there, & after y^e Declaration of War, he received property in satisfaction of the Debts, and the Q^u was whether an insurance of such goods was legal, or is this included in that species of trade forbidden by the Law. The Ct. decided, & I think correctly, that such Commerce is legal, and the insurance good & binding. 1 Bos. & Pul 345.

The next case was upon the same Policy of Insurance, but with another underwriter, in this case the Ct. decided the policy was void, & they here said, that trading with an Enemy was illegal. The Ct. in both these cases is held, that in ordinary cases trading with an Enemy was unlawful, but that there might be some exception to it. 8 T. R. 548.

The whole then is this - of the judgment of the Ct.

Lex Mercatoria.

in the case in *Dos. & Put.* is correct, there may be cases in which an insurance may be made on property bought in an Enemy's Country &c. will be lawful. and this is perfectly reasonable. There is a man residing in an enemy's Country at the time of the declaration of war, now he can have his property insured there; and if it is not for the advantage of the owner to transport his property home, he may sell it there & convert it into Cash - this is a species of commerce. So where he has debts due him (*ut ante*) he may take property to secure himself. These are the cases in which a commerce with the Enemy is not unlawful, & of course an insurance is good.

The next species of articles which cannot be insured is, that Captains, Mates & Seamen cannot insure their wages. The principle is this, it is a prominent feature of the D. C. to distribute the danger & burden equally on all. as if a Ship is in danger of loss, & one man has \$10,000 in Silks, & another \$10,000 in Brandy - now the Brandy may be thrown overboard to save the Ship & ^{the cargo} what is thrown over is to be equally borne by all according to ^{their} respective interests in the Ship. So in every case there is to be an average of the loss. On this principle it is, that Seamen's wages cannot be insured. If she is lost before she performs the voyage on which she set out, the Seamen get no wages. The reason why they are not allowed to get their wages insured, is to create a greater interest in them to save the Ship. If they could insure their wages they would not be prompt to so great exertion, therefore it is the policy of the Law not to

Lex Mercatoria.

allow them to get insured. On the same principle it is, & for the same reason, that the Seamen lose all their wages in case the vessel is captured. 7 T.R. 157.

3 Burr. 1912. 1 B.C.R. 594. Emeryon 236.

This principle, in case of Sailors, is not extended to any thing but their wages - if they have goods on board, they may procure them insured - and so they may their Trunks, Clothes &c. Emeryon 235. 1 B.C.R. 593.

The insurance here is may be on the freight, that is what the cargo will earn. But the circumstances under which the freight may be insured must be mentioned. I speak of the general & the. It is not the practice all over Europe. Freight cannot be insured in France. The risk must be begun to be run. After cargo is ready to be put on board, laying on the wharf, & not on board & the ship is lost in the Harbor, the risk has not commenced & the Insurer is not liable. But if the goods are on board or on board of any part of the ship, or in board the insurers are liable for all she can earn during the voyage, for the risk in this case has commenced.

Further. Suppose the vessel has not been captured but has sailed to receive it at another Port & in going there is lost, the insurers are liable for the freight, tho' she had nothing on board. But if she has been lost in the Port before she sailed to take in her cargo at another Port, & had no part of it on board the insurers would not be liable. Emeryon 238. affirms for

It is a question whether the profits of goods may be insured? What the profits will be is more conjecture

Lex Mercatoria.

Now I take the general R. to be that the contemplated profit is not of itself an insurable interest. The rule has always been, the Prime Cost of the goods, & which is added all the duties both here & in the Foreign Country, together with the Premium. Now all these the Insurers are, by the C. S. M. liable. In some Countries Profits are insurable. But I take the general R. to be that they are not insurable. There is no Ins. in France, for there it is settled that profits cannot be insured. Nor is there in Holland. And it is somewhat remarkable that there is not a decision to be found in y. Eng. Books, bearing to y. doctrine, except one, which is in Park 287.

We have had one case before our Ct. on this point, & they decided as they understood the C. S. M. to be, viz. that the contemplated profit is not an insurable interest. The case in Park was not an insurance altogether on the profits, but with these the ship & cargo were likewise insured. It was not expressly on the profits. But the insured claim is more than the Prime Cost duties & premiums, & therefore the surplus must have been on the profits. The Policy was a valued one.

I will now explain a valued policy. There are two kinds of insurances - viz. a valued policy, & an open policy. A valued policy means this - a man goes & insures his cargo for a sum certain as e. g. \$10,000. An open policy is where a man insures his goods such as there are, as e. g. 100 Bales of goods &c. And on this latter policy the party recovers the Prime Cost Premium & duties.

In the case of a valued policy, the parties have

Lex Mercatoria.

have agreed on the value of the goods, & no inquiry is made about the costs of them. It may be said that this kind of Policy opens a door for wagging. True. Sensible this is the case, but if the Ct discover it to be a wagging Policy they will decide the insurance to be void. As in a case where it appeared on evidence that, had insured 2000\$ & had interest on board to the value of a Cable only, the Ct determined that it was a mere cover for a wagging Policy, & that it was an invalid insurance.

In a valued Policy of Insurance (i.e. where the Parties have agreed on the value & there is a total loss, there can be no inquiry into the value, except an inquiry ^{it is necessary} into the fact whether the Policy is a wager or not. If there has been a partial loss, there must be an inquiry of course. The case on Park Antu. was a valued Policy. It was not in the nature of a wager. The insurance was upon Molasses, & there were no cases that they were valued higher than their minor cost, duties and Premiums. The Ins. was shall the Plaintiff or whole? The Policy was entered in the ground of great profit which was expected to accrue to the insured, & the ^{policy} ~~policy~~ was valued. This is not an insurable interest, but it was not a wager, & on that it was on the ground of its being a valued Policy that the Ct would not go into the inquiry as to the value. They could not get around it. They did not decide on the ground of a great profit of even one profit which the insured was expected to make on the Policy. My opinion is that the

Sex. Mercatoria.

It ought to have been in evidence to show that the profits were insured, & then to recover it notwithstanding the policy was a valued one. But the margin is there, can not be an enquiry into a valued policy, where there is a total loss. This is the only instance in Eng. Auth. in which profits have been allowed to be insured, & they were not here insured *ex nomine*. I know it has been said that this was an miserable interest. But I say it is not; & the whole course of Eng. decisions go to show that there cannot be an insurance of profits.

Altho the Policy is a valued one, when the suit is brought to recover a partial loss, it is immediately turned into an open policy, & an enquiry is to be made as to the value of the loss. The rule of Damages is the Three Cost, the Duties & the Premium. But when the loss is total, the policy is not turned from a valued into an open one. There can be no enquiry *et. Supra*.

It is clear that unless there is an interest to be insured, the insurance is a wager. Now it is an important Qu. in our Country to ascertain, whether a wagering policy is a good one? There is no Qu. in Eng. because they have a Stat. declaring such policy void. Previous to the Stat. the first decisions held that these wagering policies were void. But by a course of subsequent decisions, they were held valid. The mischief of these latter decisions became known and produced the Stat. These latter decisions went on the ground that they considered them as wagers & as such were valid. But admitting wagers to be valid, there is

Lex Mercatoria.

to my mind a wide difference between a wagering bet and a wager. A wager is always to gain something, & a wagering Policy is always to insure vs a loss - not to gain. Now it appears to me that without any bet, a wagering Policy is void. There can be no indemnity where there is no loss, & there cannot be a loss where there is no interest. But a wager is to gain something not his own. A Policy of Insurance, is in its own nature an indemnity vs a loss. But here there can be no indemnity as there is no loss - no interest. The very form of the instrument proceeds on the ground that there is an interest - so must property interest as is therein specified, & the contract is to indemnify the insured vs its loss. The instrument purports to be a very different thing from a wager merely.

But wagers themselves are not valid in my opinion. I believe it may be supported on legal principles (the not by Eng^t precedents in all the Courts in U.S. that no wager is a valid contract, & says no money can be had on them). I do not mean by this that there are Eng^t cases allowing a recovery on wagers, for they do allow them, in all cases except when they are not sound policy. I am not arguing on the ground that the Eng^t precedents will bear me out in my opinion for they contrary to it. The first case where the Ins. came up is in 11 Co 84b. where it was decided that a wagering contract was valid. The Ins. was again decided in the same way in 12 Co 33. I recognize the Ins. as a 6 Co 202.

Subsequent to that period, the Courts of wagers

See *Mercedora*

with a jealous eye. They manifested a dislike to them, and still were unable to get over the precedents. But yet they said if the wages is of sound policy we will hold it to be an invalid contract. 15th. 56.

From this I conceive no wages are good, as they are all of sound Policy. 15th. 56. Comp. 729. 25th. 56. There is no decision, however, as allowing wages which are not contrary to sound Policy. You may see a case in Comp. 37. where it was held that an innocent wages was valid. tho' the lot disapproves of wages of every kind. In one of the cases Justice Ashurst lamented very much that ever effort was given to a wages, & wished they had never been established, but said that he could not break down the precedents. And Justice Buller was of the same opinion & went so far as to say "it is never too late to resort to principle", & he was of opinion that no wages was good. but the majority of the judges were of the opinion that it was now too late to consider innocent wages void, because the course of decisions were of so long standing, that it w^d be dangerous to overturn them. This is correct. State decisio is one of the most important maxims in the Law. But how is it in the U. S.? we ought as a general rule to be bound by precedents, but when we find a course of decisions which are evidently repugnant to the principles of the C. D. & which have been combated by their own ablest judges, & we have no precedents of our own, we ought to pursue a different principle. I am not aware that any

Lex Mercatoria.

State, in the Union has ever settled the doctrine by a course of decisions - if not, it is the duty of the judges when the Qu. arises to decide that no wager is good.

But Wagering Policies, I think, are certainly forbidden by the general Commercial Law. Now it will be used as an argument, that because Eng^d has passed a Stat. and France, Sweden & Holland have made ordinances (which are of the same as Stat's) & Laws were passed declaring them void - for this, I say, the argument is drawn that they were good before these Stat's & Laws were made. This does not satisfy my mind. If the C^t. in the U. S. should support wagers we ought to have a Stat prohibiting them.

I will now state a course of decisions, on this subject, in Eng^d. You may see one in the Year 1691. in 1 Show 100. The next year there was another decision, it was a Wagering Policy & the C^t. of Ch^y determined that the Policy should be given up & the Premium paid back see 2 Vern 269. In the Year 1710 an action was brought in the C^t. of K. B. & this was the first case when an action was maintained. 10 Mod 77. The Qu. again arose at before Ch^y in 1716 & they still considered it void. 2 Vern 716. But the very next year the C^t. of Ch^y admitted their validity.

In 1721 we find that the C^t. of Common Pleas supported an action. 2 Stra 1200. The decision in favor of C. P. was cause of general alarm, as the writ. of Habeas Corpus was suspended, but still there never was a Stat upon the subject. see 10 Geo 2^d. Sec 2 Bar 695 & 10 Geo 2^d. And this is yet a very important Qu. in Eng^d & may be said to be.

Sex. Abolition.

The Stat. in Eng. is altogether confined to Ships of Subjects - when the Assurance is a Foreign Ship. The Lawable was - young Policies ^{as} it was formerly. See of Thelapier vs. Blitcher. (And this is yet a very important Dec. in Eng. upon a similar question! &c.)

The first ground of objections in the third Stat. is, if it is a Law, "that all wagers are void". If it is established that wagers are good, then "that wagering policies are not void". that there is no interest: & where there is no interest, there can be no loss. and then that the Eng. Statute is merely by it, that they found it necessary to pass a prohibiting Stat. And what may be said as it respects the Law of Eng. from whom we derive ours, the Law is whether here, if we have no Stat. we are to adopt the decisions of the old authorities, or of the subsequent ones.

With respect to Persons who may insure I can hardly point out the Law on this Subject at this time without going into Questions which cannot be discussed at present. So that what I now say will not be all on the Subject.

Now I cannot enter into the Question as to who may take Bonds here. But I can go so far as this, that who ever has an absolute, & who ever has a qualified interest, or he who has the legal, or he who has the equitable title may insure. It is not a double insurance usage. A living in Petersburg could send B. to London, & he should goods to pay the debt. then I sold the same goods to C. in Petersburg. Now B. has the legal, & C. the equitable

Lex Mercatorum.

title, i.e. is entitled to the residue of the property if no debt is paid, or paid first. A debt in title to the residue of the goods &c. he then has the right in title, of course he & B may both insure. 11 Bur 489. 10 T. R. 745.

There is a species of interest depending upon an event or uncertainty, which is an insurable interest. It can hardly be said to well, a legal or equitable title in ^{the goods} any one. It is a practice in Europe that ships taken by the King's Ships, under certain circumstances, altho the property rests in the Crown, yet the usage is to give the whole up to the Captain, & they treat it as much as if it was properly granted to them. They have no right to it it is a mere matter of grace. Now it cannot be said they have a legal or equitable right to a captured vessel, for they cannot enforce this right in any Court. But, still don't property may be insured for the benefit of the Captains. The principle is, that where there is a just expectation that the property will be theirs, as in this case, long usage has given reasonable grounds for expectation, the property may be insured. Almon Hall 84. I mention this to you, as it may apply in other cases.

Persons who are trustees for others, i.e. those to whom goods are assigned & agents for ^{others} persons may insure. They have no real interest, but it is considered as done for their principals, according to the maxim *qui facit per alium facit per se*. 8 T. R. 13.

It has been made a rule whether a thing is a chattel or not, whether it is or not belong to the person

Lex Mercatoria.

having the interest, & he alone should do it? But it has been decided that the Ceding que trust may insure. 1 Bos. & Pul. 310. Any person who has an insurable interest may insure. The person having the legal title will perhaps refuse to insure, & in such case the Ceding que trust must be allowed the privilege. If both parties insure there cannot be a double recovery.

*Bottomry Bonds are likewise an insurable interest. Can the goods bought with the Bottomry money be insured? I find in the Books that they may be insured. But certain writers represent themselves somewhat incorrectly when they say they cannot be insured. It is true only the value of the goods over the amount of the Bottomry Bond will be the rule of recovery. A small interest over & above the sum insured is not regarded - as if a man insured 10,000^l & it appears that he had but about 9,000^l to insure. The Ct. do not look into the subject with eagle eyes. but decise where it is a mere cover for wagering as in the case of the Cable before mentioned. - Cable case. 2 Bos. 1171. 6 Dougl. 583.

It has been attempted to be shown that a void Policy is void, since the Stat. as it opens a door for wagering. The Ct. have however devised a method of getting along with the subject, by looking into the Policy to see whether it is a wager or not. But they are not scrupulous to see whether it be exactly valued or not; so that where an insurance is in reality meant for an indemnity the Ct. do not examine with eagle eyes to discover the valuation.

Lex Mercatoria.

If there is a total loss the sum mentioned in the valuation policy will be paid. If the loss is partial, an inquiry will be made &c. Meantime.

There may be what is called Re-insurance. and this is not a double insurance. It is when a man insures property (as an insurer) & then gets his own risk insured. It is not where a man gets his property insured & then gets it insured over again.

Re-insurance is allowed by the D. & H. But the Eng^l have prohibited it by Stat. They considered it an evil. They will not allow it by the Stat. except where the former Insurer becomes Insolvent, or bankrupt, or dies, & in y^e last case his Executors may insure. Now why is this allowed? It is undoubtedly for this purpose - viz the first insurer finding himself insolvent or bankrupt, & having received the Premium, he will know he cannot pay the insured in case of loss. & if he could get his own risk insured he could pay if a loss happened, or if he died his Ex^{ors} ^{or} do it for him. On this ground, in Eng^l they allow a re insurance in the above cases, excepted in the Stat. vs reinsurance. It is allowed in these cases to protect the insured. - Where the man dies, in order that others may not be kept out of their due till the Estate is settled, which is often a great length of time - they allow the Executor to insure.

Sex. Mercatoria.

Lect. 4th March 26th 1813.

Double Insurance is a very different thing from a Reinsurance. Double Insurance is when a proprietor of the ship or goods, or owner of the Freight is insured more than once, at different offices or by different underwriters. The object in double insuring, was no doubt to recover twice. But the principle here is similar as at C.R. It is no matter how many insurances there are they are all legal but you can have but one satisfaction. If you recover to the amount of the insurance at one at one office, you cannot recover at another. So in case of underwriters where one insures \$1000 and another \$1000 &c. you can recover at one only, & you recover the value. There are different actions to be tried vs the different underwriters, and you may resort to which of them you please. But those who do pay have a right to resort to the others who have insured for their rateable proportion of the insurance. as e.g. A at Hartford insures 10,000\$ & B of N.Y. have for the same sum. & now if the goods are lost y^r owner may recover of A. the \$10,000. and A. may recover 5000 of B. So that an insurer may insure for the purpose of dividing the interest. Beaumont & Co. 242.

I am particular on this subject because formerly the Eng^l cases were otherwise & contrary to D.M. But the cases in Beaumont are according to D.M. & to these to Eng^l doctrine has since conformed. The former said that whoever subscribed first, was first liable whether the insurance was made by office or individuals.

Lex Mercatoria.

and then the others had to pay back the Premiums. 18 How 132.
I fear this case is shown, till the cases in Beaumont. 16.
the Elementary writers considered as the Law

With respect to the Law, when different persons
have different interests, the Law on that subject does
not seem to accord with the Equitable principles of
the Law. As to the Law, I have no doubt but it is
the settled Law. It is this one may have an interest of
one kind, & another an interest of another kind. As to the
A Petersburg merchant being indebted to a Merchant
in London. Consigned goods to him in the nature
of a mortgage. After he had done this, he gave a mer-
chant of Petersburg a Bill of Sale of the same goods.
There was no fraud in this transaction. The last mer-
chant was to have only the surplus which remained af-
ter paying the London merchant his Debt. The mer-
chant at Petersburg insured the whole of the goods & the
London Merchant did the same. The Ship was lost. The
English Merchant had the legal title & the Russian Mer-
chant the Equitable interest. The Law was, what a law
was to be the recovery? It at first seems at first view that
the recovery sh^d be according to the interest. But the
rule of Law is, that both of the interests recover to the
amount of the goods insured. 11 Den 489.

This is not according to the Equitable princi-
ples of the Law & it is so contrary to the ^{equitable principle} of the
Mansfield that I am sure the doctrine w^d not have
prevailed had not the Law been considered as well
settled. This you will observe is not a double insurance.

Lex Mercatoria.

By a Double insurance is meant the same property insured twice, but here were two distinct owners.

The next thing I shall notice is the Voyage. It may be an unlawful one; if so the insurance is void. The voyage is a different thing from the Commerce. The voyage may be illicit, altho the articles might be carried, as if vs the Laws of the Country. The voyage may become unlawful, not on account of the Cargo, but on account of the circumstances of the time.

The Voyage is the passage of a Ship from one port to another. The voyage may be illicit, & the Commerce at y^e same time allowable. When y^e Laws of a Country forbid navigating to a certain port or Country, then the voyage is unlawful; or where the navigation is monopolized; as if the voyage can be performed only by certain persons, or some others who were licensed by them, as e.g. the East India Co. Now a voyage by a Stranger in such case is unlawful & the insurance on such a voyage is void. In the case of the monopoly Supra, no one can trade to the E. Indies without a license from the Company.

A Qu. of some magnitude in point of property & principle has arisen. In the Treaty of 1795 there was an article admitting all American vessels to Trade to any port in the East Indies. The Qu. arose on an Insurance whether a coasting voyage was within the meaning of the Treaty. The Americans had no right to engage in the Coasting trade of the E. Indies. The answer was this - The Ship was not going direct to y^e Indies.

Six. Mercatoria.

The vessel to Europe took on her cargo on France. The question was whether this circuitous voyage ^{was} within the meaning of the Treaty if it was, the insurers were liable, or the Ct determined that the insurance was limited to the insurers liable. 8 St. R. 31.

The same case gave rise to another question. One of the Proprietors was a native Englishman & resided in America, and the question was whether he was included in the Treaty, or whether it was the intention that none other than Americans might trade to it. The decision of the Ct was still in favour of mercantile principles, & applicable to him as it respects commerce. Any man residing in a Foreign Country is as much entitled to the benefit of a Treaty as if he was a native born citizen of that Country, i.e. for the purpose of commerce. ^{Mass. Rep. 430} This principle is laid down on Vattel. The Englishman was not there at the time of making the Treaty. The insurance was held good & recovery had.

Of Risks.

The insurance may be for any risk or risks. Indeed the policy seems to include all risks incident to a voyage, subject to certain exceptions. Some of them you have seen.

An insurance is, a man's own misconduct is void. If the insured is even fed onought to insure as the warranty of another, he will not be bound by it. And no insurance is good as any prohibits commerce or illegal voyage. There is scarcely nothing but what an insurance may be made.

You may draw your policy as you please.

Lex Mercatoria.

insurance as one peril or as two. If the insurance is as to all the risks are those risks of the Sea, Men of War, fire, &c. &c. some of these terms are unnecessary, as e.g. the risk of men of war may be included in that of men of Robbery, Thieves, &c. &c. (which means where goods are shown to be lost by the ship). Letters of Marque, Capture of Sea, &c. are any restrictions, as by embargo, &c. &c. of the Merchant or the insurers (which means the misconduct of the merchant &c. &c. & then a qualifying clause is inserted "as to all other perils, losses & misfortunes". This will include everything as which an insurance can be made. I will mention one thing - suppose the insurance is made as to the perils of the Sea only, not as Capture. Suppose France & Eng. at war with each other, & the vessel is sailing on the coast of Eng. is driven on by stress of weather on the coast of France, & is there captured by a man of war. Now is this a loss by perils of the Sea or by Capture? This Qu. very frequently arises. The decisions are always governed by this. It is not a proper question which is to be considered the cause of the loss - the remote cause is laid out of view. There may be a storm of weather, she would not have been captured, yet the immediate cause of the loss was capture. And this is the leading principle which must govern in all cases.

We had a case in Court of a very singular nature. A person in Windsor owning a vessel promised her insured in New Haven as one or two perils, one of which was capture & this was of the Sea. The facts were these, she was taken by a French privateer, &c.

Lex. Mercatoria.

stripped him of some things, even took out his watch, & then set fire to him. She was not insured as Captive. The owners claimed the insurance was liable, as it was a loss by fire, & the insurer claimed it was a loss by fire. The owner contended that the Captive was the remote cause of the fire, the proper cause of the loss. When the Ct. decided for the owner, I said that it was a loss by capture. They went upon the ground that the insurer did not insure us for purposes by set to him but as a loss which might happen by accident or fire. The selling price to her was a continuation of the private law. Remember that on the 11th an English authority was introduced to show that where a vessel was insured as fire, the insurance included a fire happening by lightning. These are all questions. I do not know as I have seen a clause inserted in a policy of insurance as to lightning. It may be inserted in the Sweeping clause.

According to the old law, as it formerly stood, for any loss total or partial, the insurers were liable, with the exception that if the loss did not exceed one p.c. there was to be no recovery. So stood the old law, but it is not so now. The policy contained those risks. But now all insurers add a memorandum altering the general provisions of the policy. The policy stands as it was without the memorandum, the Law is, as I stated to you. The mem: is now added. There are certain articles, here in case of a partial loss there can be no recovery except in certain circumstances which

Loss & Averment.

will be by mention. If the loss is total, there is to be a recovery. In other articles there is to be no recovery unless the loss exceeds 3 p.c. & in others it must exceed 5 p.c. The memorandum specifies Corn, which means all kinds of grain, Fish, Salt, Fruit, Flower & Seeds. If there is a partial loss in these, the insured cannot recover, unless the loss is general on the Ship or Stranded. Let there be a partial loss of Corn &c. & there is no recovery. If the loss is total, then pay the whole value.

In other articles there can be no recovery for a partial loss, unless it exceeds 5 p.c. If it does exceed 5 p.c. the Insurers are liable. These are, Sugar, Tobacco, Hemp, Flax, Hides & Skins. In all other articles where there is a partial loss, no recovery can be had, unless that loss exceeds 3 p.c. This memorandum changes the operation of the policy, so that if this memorandum was not added there would always be a recovery for a partial loss, unless it did not amount to 1 p.c. There is an exception to this. If the loss is general, a partial loss is to be recovered on Corn, Fish, Salt, Fruit Flower & Seeds. By a general loss is meant, that loss which the different persons have got to pay according to their respective interests on board. As e.g. A man has on board a quantity of Fish (which is a heavy article) & another has a Trunk of Belts (which is light) & some of the heavy articles are thrown overboard to lighten the Ship. There has been a partial loss, but this partial loss is general for the owner of the Fish may call on the owners of the Belts for his part of the loss. & on the other hand

Lex. Mercatorie.

loss of the nature that it may be recovered, every
person is to pay according to the value of his property
on board. -

In the next place you will remember that there
can be no recovery unless the loss is general, or the
ship is stranded. Now in such case if there is a partial
loss the Insurers are liable. What is meant by the ship
being stranded? Out of this has grown a notable dispute.
Does it mean that it is a condition that if the ship
is stranded, & a partial loss happens, let it happen how
it will, the insurers are liable? as e.g. if the partial
loss happens 2 months before she is stranded, are the insur-
ers liable for it, because the ship was stranded, tho
the loss happened in some other way? Or, does it mean
that loss, occasioned by or which happens in consequence
of the stranding. The first decision was by Chief Justice
Ripley & he understood it thus: that if the ship was
stranded, the insurer was to pay for the partial loss
whether or not it was caused by the stranding. Mr. Mansfield & Justice Buller
understood it differently. Mr. Wemyss has since also
voiced the opinion of Mansfield & Buller, & decided it
as they decided, viz. if there is a stranding, the insurers
are liable for a partial loss. I will point out the
authorities. See 2 Burr 1000. 1003. Park 116. 7 T. R. 216.
4 T. R. 753. See Wemyss's decisions in 7 T. R. 210: which is
also reported in 1 Esp. R. 2416.

The whole subject is this. before there was any
maritime insurance, loss was recoverable, if it was caused
by the addition of the marine loss, & the

Sex. Mercatoria.

It is to be taken out of the policy, unless when the loss is as general on the Wharf as stranded. Or Tobacco, Co., Sugar, Hemp, Indigo, Hides, & Others no partial loss is to be recovered, unless it exceeds 5 p. cent. And in all other cases, there shall be no recovery for a partial loss unless it exceeds 3 p. cent. Suppose they sh^d. insert in the mem^o. "unless it exceeds 2" or 6" or 7" per cent." no doubt, but they would be bound by it. Customs have to be guided the present as it is, but no doubt that if Parliament may alter it in the mem^o. & state therein what percent they please, it w^d. be binding.

There is another set of cases where no risk at all is to be run by the Insurer, i.e. when the loss has happened thro' the misconduct of the owner or master or machinery the insurers are discharged. I mean when the insurance is not as the Warranty of the master &c. There must be some misconduct; & if a loss happens in consequence of such misconduct, the insurers are not liable. But it may seem different in case of Goods, because the owner of the Goods has his remedy as the master or owner. This is not strictly proper of the case. But suppose the reason of the loss was, that the vessel was not seaworthy, this is misconduct in the owner & the insurers are discharged. Yet this over the ship owner did not know that she was not seaworthy. For there is in such case an implied engagement on the part of the owner, that she is seaworthy. If she is not, the contract is broken, the insurers are discharged, but the owner is liable.

Sec. Mercatoria.

See the last rule in *Emerigon* 586.

Suppose the loss happens thro' the wilful mismanagement, or negligence, or ignorance of the master, the owner is liable. So also the master is liable for his own negligence; but not for that of his mariners, tho' the sailors are. At what basis? Why, suppose the loss happens thro' want of careful storage, the owner is liable or suppose the master leaves the vessel in a hurricane, & puts to sea, or sails in a hurricane & is on shore nobody else would, in such case the owner is liable, & the insurers are discharged. The principle is this the loss happens thro' the fault of the master or owners, & as this it is understood there is no insurance.

I will take notice of a case, which is frequently mentioned as opposed to the *D. M.* The case was this. A number of fellows went on board a ship, blacked up, & call'd themselves a kresgang, & having no business took this opportunity of robbing the ship. The owners were called upon to answer the insurers (see *Case Ins. above*) & the Ct. determined that the owner was liable. Now it was said this is carrying the principle too far, further than it was author'd by *D. M.* I know that a Common Carrier is liable for every loss except it be occasioned by the act of God, a public enemy, or by the act of the Goods himself. The fact was that the decision was made on the ground that this vessel lay within the body of a County, & therefore the loss was within the denomination of Common Carrier, who are governed by the law, & not by the *Case Ins.*

Sir. Hercules.

The case was decided on C.D. principles & this explains it. The vessel carries property & the owner was made liable as a common carrier at C.D. - He is not therefore opposed to S. M. - there is no such principle in S. M. For here by S. M. the owners are not liable for Robberies & Smuggles &c. - I have seen Hoar's opinion of this case, in his history of the C.D. & it is, at supra. *West 190. 5. May 220. 550. 551.*

The same principle applies to all landing of goods & putting them on board. In doing this, suppose they are lost. are the master & owners, or are the insurers liable? This depends entirely on this. Did the loss happen thro' the negligence or misconduct of the master or mariners? If it did, the owners are liable & the insurers not. But if the loss happened thro' inevitable accident - as if the boat was good, & a degree of care was used, commensurate with the nature of the case & a loss happens as by a sudden gale of wind which upsets the boat, the insurers are liable and the owners are not. The insurers liability commences where that of the owners ceases.

By the English Statute the owners cannot be obliged to pay more for accidental injuries, than the value of the goods & the freight. This regulation exists by Stat. & that Stat. is not binding on us in the U.S. The S. M. is different.

Sec. Mercatoria.

Lecture 5th. March 27. 1813.

An owner to charge the Insurer with loss, the loss must happen during the continuance of the risk. Now it is necessary that I should notice how long the risk lasts. If the Insurance is for a limited time there is no difficulty - it lasts just so long as the time specified. But the insurance on ships and goods is different. It is a common thing to insure privaters. It is very common to insure "at & from", sometimes "from" not "at". The meaning is taken accordingly.

I shall first notice to you the risk on goods. When there is an insurance on a ship, at & from such a place, the risk on the goods commences, when the goods are put into the ship to go on board, and both ways is insured. It is often said the risk commences when the goods are put on board - but this is not the case. By the N. M. if the goods are insured in a vessel insured, nothing more is said, the risk commences from the time of putting on board. If the Boats are bad the owners are liable & not the insurers - but if the loss happens by an avoidable accident the insurers are liable. The policy ordinarily runs thus. They insure the goods from the time of the loading on board until they are safely landed & discharged. The moment they are on board [of boats &c.] the policy attaches to them. But they are insured till they are safely landed and discharged. Suppose they are put on board at N. York to go to Charleston. Now if the goods

Lex Mercatoria.

are unnecessarily removed from this ship & put on board of another for the convenience of the proprietors, the insurers are discharged, for they insured on board of that particular vessel only. The insurance does not extend to any other ship except that on which it is made, unless a clause to the contrary is inserted. It may sometimes become absolutely necessary to remove the goods on board of another ship, & in such case the insurers are not discharged as if the ship sprang a leak, or is disabled from making the voyage & has to put back & then meet another ship & put the goods on board of the latter, the liability of the insurers continues. The insurers are discharged in those cases only, where the goods are unnecessarily removed to another ship. If the Policy provides that they may be removed to another ship, it is good, & if there is a removal the insurers are liable for loss.

There was a case of this kind - a vessel was insured, & the goods on board, from Long to Gibraltar, & to some other Port, & there was a clause in the Policy, that when they arrived at Gibraltar they might send the goods by another ship to this other Port. On their arrival at Gibraltar, they found no ship on board of which they could send the goods, & they put them on board of a store ship in the harbor - which is the usual custom - these store ships are for the same purpose as stores on land. The goods were lost while in the store ship by accident. The Ins. were the Insurable. It was determined they were. The Ct. decided upon it.

The Warehouse.

now is that the being a ship going to the port to which the goods are destined, it became necessary to put them in some of the Steamer Ship which was the common mode of transport. 18th Nov 48. 349

Now duty is it to limit the owner? It is 7: duty of the owner to point out where the goods shall be landed, i.e. in what part of the Harbour the landing shall be.

But if the goods are lost in the Harbour, the insurers are liable. i.e. the insurers liability is limited to the safe landing of the goods, in case there is no unnecessary delay. But if the Harbour delays to land the goods for a long time, & they are lost the insurers are discharged. The conduct of the owner or Master in this respect must be reasonable. There has been some discussion as to this, & a singular distinction has been drawn. The owner of the goods must on the landing & point out where it shall be. The distinction is this that if the goods are put on board of boat, belonging to the ship, & they are lost going ashore the insurers are liable. But if they are put on board of a lighter belonging to the owner, & they are lost before they are landed, the insurers are not liable. 2 Feb 12 76.

A question whether this is now law. The distinction has since been narrowed down, but I give you my reasons. The practice has been to keep public registered lighters in every port in the port. & if goods are lost on board of these the insurers are not discharged. Now if a man's own lighter is used, & the goods are lost on board of his own lighter, the insurers are not discharged.

Sea-Monitors.

So doing we would discharge the Insurers when loading the goods on board a public lighter; the insurers would not be discharged. There is no reason in the distinction. The law was the same now to come, it would be overlooked. Marshall 166.

The landing must be in a reasonable time. But there is a custom in some places allowing more longer time to land than in others. & in some places, the custom is never to land the goods at all. (Whoever insures sh^d. then make himself acquainted with the particular Customs of different places as respecting landing of the goods.) As in trading on the coast of Guinea it was the custom to trade from the ships. The goods were seldom landed except by degrees as they sold them out in small quantities. In this way they traded along the coast from port to port. Now the insurers of such a voyage would be liable, tho a great length of time sh^d. elapse before the entire landing of the goods, because the presumption is the insurer is acquainted with the course of such trade. & receives a premium accordingly. The case in Park 314 was where the ship arrived & might have landed the goods & 4 weeks afterwards was captured. The insurers claimed that they were discharged. But the Ct. decided they were not, on the presumption that they knew the trade &c. - Park 314.

So likewise the Fishing Trade to Newfoundland is of the same kind. The owner goes out with the ship & insures it, but it is never landed. It is all without landing.

Sex. Moratoria.

Can doing or used as they want it. There is a case of this kind called the Subandon case, which shows that there is no necessity that the usage should be of long standing. If the trade has been carried on for a short time & the usage for that time is sufficient. Long v. Short is the name.

On the part of the Owners of the Ship, it is their duty to desert. The Goods to be landed within a reasonable time with the exception of those customary cases. On the part of the Insured they must permit to have the Goods taken on Shore.

Of the duration of the risk on Ships.

If the Insurance is for a limited time there is no difficulty about it. If it is "on" a boat which is to set sail, the risk commences at the time she sets sail, although she is driven back, or detained by contrary winds. Where it is "at & from" the risk commences from the time of the subscription of the Policy. But if the Voyage is given up, or is suffered to lay over an unreasonable time, the Insurers are not liable for her while there. And whenever it appears that the vessel is not going to the Port to which she is insured, the Insurers are discharged. As if she is insured for Lisbon & loaded with a cargo for China market, whereby it is evident she is not going to Lisbon, the insurers are discharged. Where no risk is run the Insurers must give up the Premium.

How long does this risk last? All the time she is at Sea & on a voyage. But after her arrival at the Port of destination, how long does the risk last?

Tex. Mercatoria.

This is generally regulated by the Policies. But sometimes they insure barely "at & from," or say "from N. York to Disbom" & no other words are used in the Policy, as was the case in the original policies. It appears by the contract that if they did arrive at the port, & anchored safely within it, the policy was complete with the risk determined & the Insurers discharged. But the truth is, they have introduced a clause in the Policies, both in England & in the U. States thus "from N. York to & y^e Port of Disbom being safely at anchor 24 hours." This settles the point at once. The insurance on the goods may last perhaps longer. But if insurance on y^e ship it is different.

Case 33. Some Questions have arisen under this, as to what is meant by "being there anchored 24 hrs in safety." There was this case. The Ship arrived & was there anchored more than 24 hours. She was then seized & confiscated as the master had been smuggling. The insurers were held not liable. 15th 12 260.

And analogous to this was the case of a Ship insured for a limited time, say 3 months and 3 days before the expiration of the time she struck a Rock, but she came kept her above water till 3 days after the expiration of the time. The insurers were discharged, for she was not lost till the time for which she was insured had elapsed, altho she received her death wound before. 15th 12 26.

The words of the Insurance are anchored in good safety. The two cases above are decided as "in good safety." But there are other cases under

Lex Mercatoria.

these words. viz. The Ship arrived & anchored but before the 24 hours had expired she was ordered to pour from. *Reins ex tunc*. Now was this arriving in good safety. Was she not arrived 24 hours on the port before she was ordered out. it would have been "anchored 24 hours in good safety". But here she was ordered out before the 24 hours expired & she could not get out. The be held that the Insurers were liable, for she had not arrived & anchored in good safety. And it is a rule in all cases, that the Ship gets into port in safety, yet if she is ordered out before the 24 hours have expired, the Insurers are liable, tho she does not in fact get out, till after the 24 hours have elapsed. 2 *Sea 1248. Port R. 211.*

() With respect to a general insurance without a clause of "having anchored 24 hours in good safety", I have to observe, that the General T. M. is, "the moment she arrives & anchors". There are cases of this kind. a vessel is insured from London to Jamaica without mentioning any port (tho there are many different ones in the Island) - or from N. York to Martinique. The clause of 24 hours is inserted. now when is she safe? part of her Goods are to be delivered at one port, part at another & yet remain at a third. Does the risk continue till she arrives at the last port? The Question has been settled that if she arrives at any one port in the Island of Jamaica, & remained there 24 hours in good safety the Insurers are discharged. The case came up in this way. I insured a vessel from London to Jamaica till anchored 24 hours in

Six. *Incubation.*

good safety & then Binsure her at a price per annum.
after she arrived there back again to London. She was
lost going from one port or place to another. She
was at Little Port. B. was liable for his liability
commenced when she sailed. The Ins. you see, was
between the two Insurers; & as B. was liable, & the
Ins. was a kind of them. It is often B. the person
liable for A's liability, ^{cause} on the safe arrival of the ship
at Jamaica & after she had anchored on safety 24 hrs.
this is a common practice of ^{going, from port to port & the} ~~insuring~~ ^{of this}
kind will frequently arise in L. M. - Our Trade in
New England ^{to E. Indies} is very much so - they do not expect
often to land the Goods entirely at one port & they get
them insured "to the E. Indies". Some of these, arrive at any
port in the Indies & stay there 24 hours in good safety
the insurers are discharged, & if she is lost in going
from port to port & there is no second insurance, the
owners are themselves the sufferers. 18th. 417.

There is an insurance distinct from the
before & distinct from the Goods, - which is on the Fur-
niture, tackle, rigging & provisions on board the
Ship. These articles are expected will remain on
board & never be landed. And when they are insured
if lost at any time during the voyage, & while war-
rant, the Insurers are liable - & if it is necessary to put
them on Shore, still the insurers are liable. But in
order to subject the insurers for a loss of these ^{on shore} it must
appear that they were stowed in a proper place. in
a case where the Furniture &c. were put in a store.

5. *Lex Mercatoria.*

Heaven on the Wharf, & it was burned down, everything in it destroyed, the insurers were liable. This Store was a proper place to put them in. But there must not be a custom of insuring of these articles if the Cargo is wrong many the insurers are discharged. They are generally, but do not use the Ship, needs repairs. 1 Bur. 341 4 S. R. 206.

Now if there is a particular custom of a trade entirely different from the general usage in trade, it must not be mentioned in the Policy, for the Insurers are presumed to be acquainted with it. It is a common thing to insert in the Policy, "and will for such a Port to touch a Port," "with liberty to touch Slaves & trade on the passage" not designating any place. By this, at last. Mo. is meant any place in the usual course of the voyage. & if a Stop is made at any such place it is no deviation. This is the general rule. If there are two Courses, which are taken & the distance & risk is equal in both, the Master may take which of them he pleases. Doug. Lefevre v. Wilson.

But the trade to India, both E. Ind. & W. Ind. is to send the Ships back & forward in intermediate voyages (as when they arrive at Calcutta they send the Ship to Madras) & not in a direct course. Now if the Ship is lost in such a voyage, during that time, the insurers are liable, for the insurers receive a premium commensurate with the risk, & the custom (int. supra) they well know. The Insurers may make the insurance for a limited time. Page 41.

See *Merrell v. W.*

This depends on the usage & the contract, & always shows a custom different from the general one. See also as proving a custom at *Colt. Park 50*.

There was one case where the Policy of Insurance was from South to North a port, with liberty to touch & stay at another certain place. The word "trade" (which is usually inserted) was left out, whether by mistake or not does not appear. The ship stopped at y^e place & traded & afterwards was lost. It was supposed to be in consequence of the delay occasioned by her stopping to trade, & it was held that the Insurer was not liable - for it does not appear that the Insurer intended she should trade, but only stop for accommodation &c. There was a case of this kind in Conn^t. The vessel was laden with chert & insured to go to Baltimore with liberty to touch at Norfolk, & she stayed there so long that the weather was damaged her cargo. *125 610* for freight & cargo.

Of the duration of the risk on Freight.

I have before been obliged to mention this to you. It commences when the goods are put on board. *2 St. 1251*.

It lasts usually as long as that on the ship. When the Insurer is discharged from his liability on the ship, he is discharged from his liability on the Freight. There is an Exception to this where the ship sails from one port to another to take in her cargo at the latter port. If she is lost in her voyage from the latter port, the Insurers are liable for the freight, though she has no cargo on board. *3 T. R. 362. 6 T. R. 478.*

Six. *Mercaderes*.

Further there is no such thing as changing the risk, without consent of the Insurers, & say, there is no such thing, except in case of necessity the plea of necessity will prevail. But otherwise the risk is not to be altered. I will mention a strong case, & I very much doubt whether it can be supported. It was this - a merchant ship was insured to go from one port to another - & being in line of war they found it difficult to find sailors - & for the purpose of procuring sailors they took out Letters of Marque, never intending to use them - nor did they use them, but took them out for the purpose of decoying sailors - as many would go out when they had an expectation of getting prize money who were it otherwise would choose to remain on Land. They went direct to the Port, - & it is clear by having Letters of Marque, the risk was not increased; it w^d. be decreased if they meant to defend themselves. But the insurers were discharged, as it laid a temptation for the Captain & men to deviate in pursuit of prizes. S.T.R. 580

Now it is a principle of the L.A.M. that the strongest intention to deviate, shall never discharge the Insurers, if there is no actual deviation. Therefore I think the above case cannot be supported.

There was another case as strong, determined the other way - the insurers were held liable. A vessel took out Letters of Marque as above & for the same purpose, with no intention of ever using them. But she never took out a Certificate from

Sec. 6. Reculera.

the officer of government, which was necessary in order to make the Bill of Lading legal. The vessel sailed & was lost, & the insurers were held to be liable. 5 T. R. 379. Now how does this differ from the former case? The latter had no legal Bill of Lading but in the former case their Bill was legal. Where the Bill of Lading ^{was legal}, the insurers were discharged. & ours was illegal. So that it seems the rule of making the Insurers liable depends on such case on the legality or illegality of the Bill of Lading. This case was decided on two grounds the one I have mentioned at supra. The other was this that a person may get insured not the Barratry of his own Captain, & in this case there was such an insurance. What is Barratry in the Captain? Any misconduct in him. Now it was misconduct in the Capt. to cruise in the case at bar. It appears to do Cruise, for he met with an American Ship & plundered her, & the owners were made liable to the American & then they the owners) took a policy not the Insurers for the misconduct of the Captain, & which they had insured. & so on this ground too the insurers were held to be liable.

Sec. 6. March 29th 1813.

I shall now treat of the instrument called the Policy. It seems this is an Italian word signifying a "writing of indemnity, & a loss," and you will observe that the contract contained

Sec. Mercatiles.

in the policy, & altogether on the part of the Insurer
he contains nothing to be done on the part of the insured.
There are engagements, made at the time on
the part of the insured, which if not complied with,
will discharge the Insurer but these form no part
of the Policy. And the consideration is always acknowl-
edged in the policy whether received or not, & is called
the "Premium", & in a lot of justice it cannot be made
a Ques. whether this has been paid or not. Now are
not to understand by this that if the premium is not
paid, the Insurer cannot recover it. What I mean
is, that in any suit on the policy, the insurer is pre-
cluded from saying he has never received a premi-
um. But when the Insurer sues for the premium,
his acknowledgment in the Policy is no evidence that
it has been paid. It is only evidence, & this is in dubi-
ta, when the suit is on the Policy. As e.g. A insures
B. for 10,000 \$ & acknowledges the receipt of the premi-
um on the policy, & the Ship is lost. Now B. can sue
A on the policy & A cannot deny the payment, for
this would destroy the validity of the policy. But if it
was not paid A may sue B. for the premium & the
policy is no evidence that it has been paid.

As Policies were formerly, the form was inter-
est in no interest. This was the practice, & then
a recovery could be had whether there was an inter-
est or not, i.e. when wagering policies were allow-
able & recoverable. But now this is prohibited & seems
no further than that it usually inserts the form is kept up.

Gen. Mercatoria.

for if there is an interest it is a good policy tho it is not expressed. & if there is no interest the Policy is void tho expressed. If not expressed there is no presumption that there is no interest. ^{2 B. & W. 1171.} I have already mentioned that there are two kinds of policies - very open & valued. I shall now explain them.

An open Policy is an insurance on the goods such as they are, so many bales &c. So upon the Ship. In this policy the rule of Damages is not agreed upon by the parties in case of loss but the insured will receive the exact amount of it upon enquiry. This is the Prime Cost, duties & Premiums, as I before mentioned.

A valued Policy is where the parties agree upon a certain sum which they say is the Value, & in case of a total loss, no enquiry is made, but the Damages are valued up according to the sum agreed upon as the Value. When the loss is total, this valued policy is in the nature of liquidated Damages.

It is evident this opens a door for wagering, & no doubt many of these valued policies are wagers. But this fact is subject to enquiry, & if it appears the policy is void. If there is a real bona fide interest, but valued too high, the lot will not be overburdenous about it. But suppose there is an interest which the owner states to be worth \$10,000, & the insurer enters into a valued Policy for this sum, & takes his Premium accordingly, & it turns out the interest of the insured did not exceed \$4,000, & this was well known to the Insured. Now the insured has a strong temptation

Sex. Mercatoria.

to have the vessel scuttled that she may be lost, in
to produce some other fraud upon the Insurer in order
to recover the whole Policy. Public weal requires
that this transaction should be considered as dischar-
ging the Insurers. You will distinguish between this
case & a wager. Suppose B. comes to A. & says, Sir, I
have got Goods on Board worth \$3,000 I wish to know
if you will insure for \$10,000 this is a wagering con-
tract. But suppose he gets \$10,000 insured without giv-
ing the Insurer knowledge that his interest on board
did not exceed 4,000 \$ that he knew it himself, now
no man would do this unless he had some fraudulent
object in view. It is, I say, considered as evidence
that the insured intends to commit some fraud, as e.g.
to scuttle the vessel or suppose on this ground the In-
surers are discharged tho it is not a wagering pol-
icy. But the Policy is often valued too high, & yet you
cannot infer a fraudulent intention from the dispari-
ty, the disparity is not so great. In some cases there is
no fraud & yet there is a great disparity, in these cases
the insurance is good. E.g. A man in the U.S. has pro-
perty in the E. Indies & gets it insured in N.Y., & makes
his calculation as to its value, as near as he can, & the
Insurers trust to him to have estimated correctly &
insure it from the E.I. to N.Y. & it appears there was a
great disparity between the Premium & the value
of the property, but not the least intention of fraud.
Now this was a fair bargain of hazard, & many bar-
gains of hazard are fair, as the case of the *Ministry*

Sex. Mercatorum.

Am. says give me 810,000 I will give you an annuity. Now the interest of this money is 81000 p. ann. he says if you will spare me the money I will pay you an annuity of 12000 p. ann. Now this is a bargain of hazard for if the lender dies in a short time, the borrower makes an excellent bargain for in his death the whole sum rests in the borrower. But if the lender should chance to live a long time, he would receive his 12000 p. ann. which in a very few years would exceed the sum lent, & he then becomes a great gainer. It is then a fair bargain of hazard - it depends on a contingency, the uncertain life of the lender.

There is a strong case of this kind in the Indies, a young healthy man had a quantity of Cash, 2500. he preferred an annuity, & procured one as above & was drowned the next day - it was a fair bargain of hazard. So in this case of the insurance it is the same. But there have been cases where the necessity was so great, that Cts. of Gov. have interfered & granted relief. But it must be on the ground of some great mistake. It is a general rule this will not interfere. 2. ver. 716.

§ 5. Not sure before, there is no difference between a valued & an open policy when the loss is partial. It is not a very uncommon thing for the Policy to take effect through the insurer & insured, but it is usually done thro' the medium of a Broker. The insurer commonly looks to the broker for his Commission & the insured to the Broker for his Com. The broker's share of a loss usually occurs on the policy. But this

Six. Mercataria.

is not always the case in L. M. It does not follow if the Insurer cannot recover his premium in an action as the insured, & so, the insured recover of the insurer on the Policy. This is true by the C. D. M. But in great Commercial Cities, as in London, it is the practice to do all the business thro the medium of a Broker. He sends his Send. Secured by the C. D. M.

There is frequently another Agent. He is a very common thing for persons living at a distance, & in acquaintance with the Brokers, to employ an Agent who is acquainted, & thus thro the medium of an Agent the Broker is employed. To explain, it is necessary I make a few observations with respect to Agents. A man who is an agent to employ a Broker must have an express ^{power} authority to employ him. But a Broker need not have an express power to make an insurance. he does it by virtue of his office - it is his business, & if he has done it it does not lie in the mouth of the insured to say he had no Authority. 5 Nov 2727

There are certain cases where a man must insure as an Agent, when he is so directed to do. It stands upon distinct grounds from cases at C. D. There are 3 cases. 1st. Suppose a Foreign Merchant in a person abroad has effects in the hands of a man in 1844. who has done business for him and is his agent, & he gives directions to him to insure, even at C. D. If for example, a man has money of another in his hands, & the Creditor directs him to pay it out, the Debtor is not obliged to follow his directions, for it is sufficient.

Sex. Mercatoria.

if he has the money ready for the Creditor. But the present case stands on a distinct principle. it is in fact a case of Commerce. He is the Agent & the principal directs him (e.g.) to insure his ship from N. Y. to London. & then the Agent is bound to procure her insured. & if he does not, he is liable. You are not to understand by this, if the principal has a right to direct all who owe him to do this. The person directed must be one who does business for him, & acts as an Agent.

The Second case is this. An agent living abroad, has been in the habit of transacting business for his principal - sometimes having effects & sometimes not - but there has been a course of dealings between them. Now suppose the principal directs him to retire - he is bound to do it, tho he is not indebted to the (Principal), unless he has notified him that he would transact his business no longer. The rule goes on the ground that he has done the principal's business (tho he may never have insured for him) as an agent, & the principal relies on him to continue in the employment; & if he refuses to insure e.g. when directed, when notice has never been given to the principal that he will not continue to transact his business, the principal might be ruined. Rev. Suppose y^r principal is solvent, is the agent bound to insure? No, Suppose not that would be a good excuse. 2 D. R. 188. 17. N. 22.

The Third is a case of person (not a common agent to transact your business - who you make you

Lex Mercatoria.

agent for this particular purpose as by sending
him the property & endorsing over the bills of lading
to him & direct him to insure. Now he is not obliged
to accept the agency he may refuse. But, if he does
accept, he is bound to insure as directed, & is liable if
he does not. The acceptance is an implied agreement
that he will do as directed.

This agency whether in the cases I have put
in in cases of agency by express contract is general, is
of great responsibility. for if there is any loss this is his
inadvertency, or negligence, or want of skill or if he
neglects to inform the insurers or cause he himself is in-
formed; as e.g. if he forgets to mention some fact rela-
ting to the Ship &c. in all these cases the insurers are
discharged & he is liable. There is a strong case of this
kind. A man was employed as an agent, & he went
to a Broker to get the Ship insured, & the owner had inform-
ed him in a letter that the Ship was thus & thus, the
knowledge of which would enhance the Premium, & the A-
gent inadvertently neglects to inform the Broker of the
state of the Ship. The insurers were discharged on the
ground that there was not a full disclosure. The
agent was liable - on the ground that a full disclosure
had been made to him. The information he neglected to
give to the Broker - & the Broker did not inform the Insur-
ers of what he himself was ignorant. The Liability is
attached to the Agent - & no recovery if he had not the
Broker or Insurer. 2 T. R. 138. 100 s. 200.

Tex. Mercantile.

In this latter case a similar Dec. was given, which in the agent. was liable for the loss which accrued in the first action - i.e. in the suit by the insured vs the insurer on the policy. The Dec. decided he was not liable, but the ground this time was this, the insured knew the fact that the agent had not made a true disclosure, they thus knew at the time they sued the insurer, there was no need of making this additional note, for they might have known they could not have recovered. This was the principle. It is doubtful if the insured had been ignorant of the fact, that the agent had neglected to disclose all, till the time of the trial, as the insured had been obliged to pay the costs of that action, the agent would be obliged to pay it. In this case the fault is solely his own.

There has been some Dec. whether if a person is fraudulent, and undertake to do a thing & neglect, by which another is injured. is he liable? Now at C. S. a mere promise to do a thing is a non-actionable wrong. But by the L. M. there may be many cases, where he would be liable - as e.g. if a man having settled his affairs, is going out of town, & cannot wait to insure, & another person gratuitously offers to get the ship insured. He is bound to do it. But the case adduced to prove this, fully shews it does not prove it. In this case the man undertook gratuitously to insure, but to transact the business so badly, that the policy was of no value. It proves that much, that is so at C. S. 12 Esp. R. 74. Sup.

Ins. Mercatoria.

Suppose a man promises to a merchant that he will transport a ^{thing} of ^{value} for nothing. No action will lie vs the promisor for a breach of his promise. But if he had undertaken to transport it, tho he expected to receive no compensation for it, yet he would be liable for all loss & accident, precisely to as great a degree as he would provided he met a valuable consideration. The case above cited to prove the principle of D. there? proves nothing more than the ^{fact} ^{is}.

The real point of the agent must affect the insured, as much as if the insured himself had been guilty of it. There can be no recovery in such case. 1st. 16. 12.

The rule of Damages when you recover vs the Agent, is the same as it is vs. of 28th. insurer, for in both cases you recover your loss. Now case. Suppose the insured ^{can} not recover vs the insurer, because e.g. he himself has made a false representation; in this case if the insured sue the agent for any thing he has done, as if he claims he cannot recover of the insurer on account of the misconduct of the agent, the Agent shall have the privilege of taking advantage of the insured's misconduct to the insurer (see reply to the above may be, owing to your own misconduct. you have deprived yourself of your right of recovery vs the insurer) Here the loss does not happen thro the fault of the Agent. 7 D. R. 157. For the case supra see Parker 303.

It is a very common thing for the Agent to sue to insurers at all when directed to. In such case the agent sues himself, being an insurer. The writer

See also *Exposition*.

back to the principle that the vessel is insured as a
a premium. no policy is made & if a loss happens he pays
the money. Suppose he refuses to pay there is no policy
or a hint to bring the action. The principal may then
sue him or recover for the policy (for his own little ac-
knowledge he has a policy), & he may state that he pro-
cured a policy at a certain office, but he does not know
what office - & the agent cannot say there was no policy.
Damages are the same as if there was no policy. Part 4.
This is a common practice.

In Policies of Insurance it used to be the prac-
ice, & still is in some countries, to draw the Policy, not
insert the name of the insured at all. so that any one
who afterwards became owner of it might fill it up
in his own name. The use was to enable the policy
to be an instrument of traffic. Some evils growing out
of this, I perceive, in France they have made a decree,
in Eng. a Statute, & the commercial code of Holland have
repealed it. By all these the name is required to
be inserted. It seems by the C. S. M. there is no necessity
of inserting the insured's name. but this is remedied or
improved in most countries. I do not know whether
in the U. S. we are obliged to insert the name. If we
are governed by the C. S. M. it seems we need not.

The ship must be named specifically, if
it can be, & when insured it must be on that ship
& no other. The cap must be on the goods on
board that ship - & this on the ground that the In-
surers know that vessel. But necessity forms an

Sex Mercatoria.

Exception, as I have already mentioned - as e.g. in a fire the Ship is crippled, & it is necessary to remove the goods on board another. The ground of the rule is the Insurer or Insurers to have in view that particular Ship & know its strength &c. Here this reason ceases.

But in some cases it is impossible to insure on a particular Ship - as e.g. a man in U.S. has property in the East Indies - he does not know or know of what Ship or Ships his agent may send it. He procures it in some town. The insurance is then made on the Ship or Ships which were being the property home. This may be said to be an exception arising from necessity. This insurance reaches any Ship...

The Species of the Vessel - whether Brig, Sloop, Schooner &c. ought to be named, as it may alter the risk. One species of vessels may be safer than another. But if there is a mistake or an error in describing the species of the vessel, the insurers are not discharged, if the risk is not increased. This is the rule of the L. Mr. Emerigon 104.

In case of Ships exposed & liable to be taken, as Letters of Marque which are merchant vessels, this ought to be named, otherwise the Insurer is discharged. The risk on these is much greater than on common Merchant Vessels.

It has been a Qu. whether the name of the Monster ought to be inserted. No doubt but C.D. Mr. requires it. But they have avoided it by a certain practice which I will presently mention. Suppose

Self. Mercatoria.

when you go to an Insurer, he asks you "who is your Captain?" You answer "Captain White". Now he is acquainted with White, & is willing to insure, knowing him to be a good sailor. But you intended sending Capt. Stakes, & had the Insurer known this he would not have insured for the same premium as Stakes is not a good Captain. So that, according to the old, the Captain's name sh^d be inserted. But the practice now is to insert on the Policy "Captain White or any other Captain whom" happen to go." Now this does is the whole... the old form of the policy is thus done away. But if, there ever was any intention that White sh^d go, but his name is introduced merely for the purpose of getting the insurer to insure, it is a fraud & the policy is void. For any semblance of fraud will vitiate the Policy. It must be like Coburn's wife, so chaste that she cannot be suspected.

The subject matter must be named, but need not be specifically set forth. "Goods & merch andize" is sufficient. If of Freight, "Freight" is suff. But Bottomry Bonds must be insured expressly. They are not included under any other term. It is unnecessary to specify or name the goods, but if they are named, the insurance will attach to no other. As in a case where a man insured goods to a certain value which he said were tortoise shells & Indigo, the insurance will attach upon them only, & there being none of either on board, the Insurers were discharged.

Comergon 299.300. That Bot^y Bonds are not goods but 1394

Sec. Mercatoris

• Now in this case of Bot Botes as in all others, the usage of Trade will make a difference. It has been the usage of the Indian Trade, to insure Wollens, 15 shds, as Botes and it is good. Marsh 225.

Further - there are certain articles which must be named. The reason is, they are not, in one sense, goods and are not liable in the same way. And some others stand on different grounds & reasons. The Masts & Cloths, & the Provisions of the Ship may be insured. But they must be specifically named, for they do not fall within the denomination of goods. So by the English Law which is applicable to the General P. M. goods landed to the Deck must be named, for on this point is greater. 40th 226.

• Now in this Country the practice is to insert words not known in the Eng^l Policies. In our Trade to the Indies, we insert these words "Cargo on Deck & in & about Cargo." This is considered as giving the Insurer as much notice as if we inscribed "Goods landed to the Deck." But the specific articles on Deck, as so many horses &c. need not be named. As to the Jew. Whether Foreign Coins Jewels &c. carried out in the vessel, fall under the denomination of Goods & are a merchant's cargo (i.e. Cargo) the rule is this. They are included if they are carried out for the purpose of Commerce, & if lost the Insurers are liable, as for part of the Cargo. & if a loss is occasioned by having to throw goods overboard to lighten the vessel, the owner of them must contribute his part. But if they are carried out as individual articles, as to Jewels &c. they are not included as part of the Cargo, & if lost the insurers are not liable. 4 Bur 199b.

Sec. Mercatoria.

The voyage must be accurately described. the place where the risk begins her departure. & the place she is bound to. The risk may be greater at one time than at another. & if the insured does not describe the voyage correctly, the Insurers are discharged. There was a case where the insurance on a ship was "from Jamaica to London". Now what do you understand by this? All agree that the goods were to be taken on board at Jamaica. It was described right. but the Insurers were discharged. Now where was the difficulty? Why she took her cargo on board at Leghorn & sailed to Genoa & laid there 3 months, and the goods being perishable were lost. The Policy was held void, for the Insurers supposed at the time of making the insurance that the goods were to be taken on board at Jamaica.

The insurance of a letter of Marque raised this question. She was insured to cruise for 6 weeks. The vessel went out 2 weeks & then returned, stayed in Port some time & then went out & cruized 2 weeks longer, returned & then went out 2 weeks longer & then made up her six weeks. In her last trip she was taken & it was determined that a policy of insurance to cruise 6 weeks "means 6 weeks successively from the commencement of the cruise. Long. & Short is Bridge.

There was a case of this kind. The insurance was at & from Baltimore to Cadiz. She was chartered out for Baltimore on Eng. & was taken before she got out of the Chesapeake & of course before she came to the dividing point. Now how do you know she

Sea-Mercatoria.

was not going to land? It was contended there was only an intention to deviate - & an intention to deviate will not vitiate the policy if there is no actual deviation. The Ct. said there was no intention to deviate, for they never intended to go to Cadix at all. We are able to ascertain by her clearing out, where she intended to go. The Ct. took this distinction: when there is an intention to prosecute the voyage & they intend to deviate from the direct course, but no actual deviation, that intention will not discharge the insurers. But if she is insured on one voyage & has no intention of pursuing it, but sails upon another, & she loses before she arrives at the dividing point of the two voyages, the insurers are discharged. Woodbridge vs. Bay, 12 W. 209. Suppose she had been insured to Balmouth & cleared out with an intent to deviate & go by Cork & before she got to the dividing point was captured, the insurers w^d not be discharged. 2 H. 80. 343. But in the case in Doug. the voyage was always intended to be to Balmouth. There was no deviation or intention to deviate & the Ct. decided as they did, on the ground that the voyage was incorrectly described. This will give you the distinction. See also Park 297. 2 779 36.

There is one singular case where liberty was given on a policy to touch at a certain place. But the vessel did not. She sailed past & was lost. The insurers contended that this was a contract to touch, & as she had not touched they were discharged. But the Ct. held that there was no such contract, and

Sex Mercatoria.

merely a liberty to touch, if he wished, & if he did not touch, the risk was not increased. The insurers were not discharged. Doug. Blanch vs Fletcher.

Sec 6. 7th March 30th 1813.

It frequently happens after you come to a certain point in a voyage, different courses may be taken to the same place. & if the course is not pointed out the Master may take which course he pleases. As in going from to Jamaica, there are 3 courses. In times of war some one of the courses may be much the safest. as privateers may be infesting both the others. Now with respect to this, it is a principle that the insurers are entitled to the discretion of the Captain, & if the Master has private instructions from his principals, & does not make them known, the Insurers are discharged. 7th 12. 1812.

I have a few observations as to the words "lost or not lost." They were formerly introduced in a Policy, on a Ship at Sea at the time of the insurance, to provide for a recovery in case she was lost before the date of the Policy. These words can have no application to a vessel in port. An insurance of this kind is good. It is a fair bargain of hazard. If the owner tells the truth, & there is no fraud in the conduct of the Insurer, no concealment or suppression of material facts, the Insurance is good. But if there is any, misrepresentation or concealment of any fact or facts, which if disclosed would have made a difference in the contract, the insurance is void.

Sec. 10. Article 11.

There is, however, another clause inserted in the Policy empowering the assured & crew to save the ship when she is in distress, & this at the expense of the Insurers. By this clause they are constituted the agents of the insurer for this particular purpose - it is for the benefit of the insurer - But the assured & crew would not do this unless they were paid - the Insurers therefore engage to pay for every extra expense, e.g. to pay them for ^{the} work which they should do, beyond their duty, & which amounts to more than ordinary care & diligence. To be sure if they do not use ordinary care & diligence & the ship is lost, the assured & crew are liable & the Insurer discharged. But under the clause above the Insurers are liable for all the trouble & expense the crew are at, beyond their duty, in saving the property, either ship or goods. This will explain a difficulty which may strike your minds, when you see cases where the Insurer had to pay more than the whole loss. This happens under this clause. The loss has been total, & then ^{have} ~~had~~ been great exertions on the part of the assured & crew to save the ship. Now they are (under this clause) agents, acting for & in mercy, & the insurers must pay them. This practice is very beneficial to Insurers. A few sailors effect sometimes almost miracles in saving the ship, when they would not thus endanger their lives were it not for the prospect of an ample & generous compensation - & this they will receive.

Lex Mercatoria.

In this Policy the receipt of the premium must be inserted. not that he has in fact received it, but he undertakes to have received it. & when sued on the Policy, he can never say the premium has not been paid. But when he comes to sue for the premium, the Policy cannot be introduced to prove he has received it. It proves no such thing. Immediately after the Policy follows the

Memorandum.

By this memorandum, as I mentioned before, there is no liability for partial loss on certain articles, as Corn, Fish, Salt, Fruit, Flax &c. with an exception which I mentioned. In others there is no liability for a partial loss unless it exceeds 5 p. cent, these are Sugar, Tobacco, Hemp, Flax, Hides & skins - & in all other articles there is no liability for a partial loss unless it exceeds 3 p. cent. Now instead of reducing the Policy by adding in it entirely & embodying the mem^o in the Policy, the Instrument remains just as it was 2 or 300 years ago; but it is restrained by the mem^o. If there is no mem^o attached to the Policy, there must be a recovery if the loss exceeds one p. cent. But the mem^o is now always inserted. You could not perhaps find a policy without it, & in such case the recovery is ut supra for any loss. The Policy & the mem^o together form the instrument.

A Policy like other instruments may be vitiated by the intervention of a l. & Chy where a mistake has actually been made. This doctrine is laid down as if it was applicable only to the D. M. But it applies to other cases. A bond may be attested in some manner.

To the Hon. Mr. Justice.

My wife would have testified to prove that the instrument was not written according to the intent and agreement of the parties. But cases of this kind will never arise. In all my practice I have never known but one instance, where a bill was filed in Chy. for the alteration of a deed. A case of this kind arose in Conn. the Justice had his instructions before him but made a mistake in drawing the Bill; by leaving one of the lines of the course & distance out, he made the quantity of land conveyed 80 Acres, when the parties had only bargained for 17 ac. Chy. directed the Bill to be altered. It was evidently a mistake. 104317. 1. Hk. 545.

It is therefore no new thing to say that a Bill of Chy. will allow parol proof to be introduced to show that a mistake has been made in a Deed, & if it is proved they will direct it to be corrected.

Another Ill. arises, can parol testimony be introduced to contradict a written instrument. The C. J. principle is clear that parol testimony can never be introduced in a Ct. if it can to contradict a deed. But it is so it can be done in mercantile transactions by virtue of S. M. I am very confident there is no such principle in S. M. It would be a most dangerous doctrine. It is denied by Malloy, & the City of New York. Authors to uphold him - & the Commentator of Malloy observes that some legal authorities say it can be done. It would be a principle productive of much mischief in any case generally more in mercantile transactions, than in any others. I have looked thro all the decisions in Eng.

Sea Mercatoria.

There is but one solitary case upholding the doctrine. I presume there is no such practice. That case has more something of a figure as it is reported by half a dozen different authors. I fear this danger is very there are but a dozen such cases but in fact, it is the same case reported a number of times. You may find it in Bartol's 44. It stands alone & unsupported by any authority. There never was a practice of this kind; neither before nor subsequent to this decision.

The next thing is what is done by the insured as soon as the loss is made.

Warranty.

The Policy is the contract of the Insured & by it the insured is not bound to do any thing. But there are warranties on the part of the insured which in their nature are such that they are not the foundation of any action vs him - but they are engagements, which if not complied with, the insured is discharged. They are all in the nature of conditions precedent - that is to say, the policy is binding on the Insured, if the Insured does his duty, but it is not binding, provided the warranties entered into are not complied with.

These warranties, & the law on this subject, is very interesting as there are more cases arising under this, than any other branch of maritime law or commerce. The express warranties are a thing in themselves & clear. The implied warranties, by implication of law from the nature of the case. Sometimes

Sec. Averaging.

It is constantly supposed a thing to be so, as that the property is neutral. This is an implied warranty, & if the property is not neutral the Insurers are discharged. In other cases, the warranty is pecuniary, as that the Ship shall sail on such a day, or that she shall sail with (certain) &c. Now if these are not true, & if these engagements are not fulfilled, the Insurers are discharged. If they warrant the Ship, did sail with (certain) & this is not true, the Insurers are discharged. So that whether it is an affirmation of what shall or what has taken place it makes no difference, for it is an implied warranty.

But in these cases can the Insurers sue if their warranties prove false, or are not fulfilled? No. They have nothing to sue for. But they are discharged from their liability on the Policy.

There are, in all cases, implied warranties, & these are not hinted at in the instrument. E.g. it is always an implied warranty that the Ship is seaworthy, - it is implied that the Ship shall be navigated with skill. It is always implied that the Ship shall sail on the voyage for which she is insured, & that she will not deviate. None of these are in terms in the Policy, but they are always implied, & in case of the non-compliance of any one of these the Insurers are discharged. And you will remember the insurance is contracted void ab initio, & as if it had never been entered into, if the insured fails in any one of his implied warranties. All the time

Sex. Mercatoria

are then void ab initio, as if never made, on both sides.

Again this is to be taken strictly. no inquiry is made as to the liability being greater or the risk being increased, if the warranty has not been performed - the insurers are then discharged & no recovery can be had. The warranty is a condition precedent. Now in case of fraud by misrepresentation (not warranty) it is different if the risk is not increased - as e.g. to say that the vessel would sail by such a time, it being in time of war, & that she has on board 10 Stout Sailors & 6 Boys & it turns out that she has 9 Stout Sailors & 10 Boys. Now this was a mistake. & the risk is not increased by it. the insurance is not affected, but remains good. But suppose she is insured on the engagement that the ship shall sail with so many or Supra (which amounts to a warranty) & she does not, then the Insurers are discharged. You will remember that all express warranties are attached to the policy.

Again - it is not matter of any consequence whether the loss happens by the nonfulfilment of the warranty or not; for if the warranty is not complied with the policy is void. To explain what I mean. Suppose e.g. the insured warranty the ship shall sail by the first of August with convoy. She does not sail by 1st of August - why? Because she was stranded; & the loss did not happen because she did not sail with convoy. The insurers are discharged. There never was any

Ex. Mercatorum.

liability attached, because she did not sail by the time.

Again the property is warranted to be neutral it was not so, but the vessel was struck by lightning the loss did not ^{happen} in consequence of the property not being neutral. The insurer is discharged, he insured neutral property & it not being so, the insurance was void ab initio. Keep this in mind, that no liability was attached the insurance void ab initio.

A Case. A vessel was warranted to sail from Singapore with 50 hands. She had 46 hands on board & 6 more a few miles below - it came a fair wind & she set sail with her 46 hands & in the course of an hour or two took on the other 6 hands - after this she was captured, & the insurer held not liable. It was urged that the non-compliance was no injury, that she only sailed a few miles along the coast & then in perfect safety. The loss happened long after, & no one pretended, in consequence of her having but 46 hands when she set sail. But the answer to this was, your agreement was, that you would sail from Singapore with 50 hands, - as you have broken your engagement of course I am discharged from mine. 15. R. 343. Cowp. 86.

This warranty to make it such must be on the face of the Policy, or more generally on its back of it. If it is written on a separate piece of paper & even referred to the Policy, it is not a warranty. It is a representation - if it is false, it is a false representation the remedy on which will be mentioned

Lex Mercatoria.

hereafter. To make it a warranty it must be written on the same piece of paper, & be part & parcel of it.
Doug. Rigg vs Fletcher. Comb. 490.

These Express warranties are numerous.
1st. There is an express warranty that the vessel shall sail before a given day. Now if she does not sail before the day, nothing can make the insurers liable. There can be no come off on the part of the part of the insured on the ground that he was not in fault. - or suppose as Embargo was laid, and she could not sail. the insurers are disch^d. for the engagement of the Insured is, that she shall sail before such a day. Suppose the engagement is, that the Ship shall sail on such a day. Nowing to a storm, or because an enemy was at the mouth of the Harbor she does not. these reasons will make the insurers liable. The engag^t must be perform^d or else the insurer is disch^d. Comb 784. (Qu. If the vessel had sailed in this storm, or knowing that the enemy were at the mouth of the Harbor, & the Ship was so, would not the Insurers be discharged? Yes. but on another ground. They w^d not be disch^d if they had insured vs a warranty of the Master.)

Another case. where the agreement was that the Ship sh^d sail after such a day. The reason of making an agree^t of this kind is, that in certain climates there are prevailing hurricanes & winds at certain seasons. In this case the vessel was insured at Martinique

See. General. etc.

It was to sail after such a day with liberty to coast
at Guadaloupe. - I was going to some place in England.
She sailed before the day to Guadaloupe, but not
with an intention of going on her insured voyage to
Eng^d. She meant to return again to Martinique
or then sail on her voyage after the given day. She
arrived at Guadaloupe & finding sufficient coaling
there to make up her cargo, & having remained
there till after the day she was to sail from Mar-
tinique she sailed directly on her voyage from there
& did not return to Martinique. - Viewing it in
this light there is no reason why the Insurers should not
be liable. She arrived safe at Guadaloupe & did not sail
from there till after the given day. But the Ct. held the
Insurers discharged, ~~for~~ for the engagement was not to
sail from Martinique till after such a day, & this contract
was broken.

It has been contended that there is a decision
opposed to this doctrine. But I think otherwise. There
is nothing in it that mars the symmetry of the Law. It
was this - The Ship was to sail on or before such a day
from Jamaica no particular port you will observe
to some port in Eng^d. She actually sailed from Jamai-
ca before the day - but she did not sail on her voyage -
She sailed to a different Port in the Island out of her
course to Eng^d. with an intent to sail from the latter
port before the day. But there was this in the case,
when she sailed from the first port she had no idea
of commencing her voyage. Her object in going to the

Sex. Mercatoria

other port was to join a Convoy, which was to start from that port before the day fixed for her to sail. But when she got there she was detained by an embargo, & did not sail till 2 days after the expiration of the time. and the Insurers were holden liable how? I conceive this case is not opposed to the doctrine. I have laid down, for it is a principle of S. Mo. that you may sail out of your course to join a Convoy - it is no deviation. She sailed when she started from the first port, on her voyage to Eng^d as ^{much as} if she had gone direct from that port - for she deviated from the nearest course to join a Convoy, & thus she had a right to do. The warranty then was strictly complied with. If she had sailed to the last port with any other view or for any other purpose the Insurers would have been discharged; and this the Ct themselves say - So that she did not first set sail on her voyage from the last port, but she did from the first. and therefore there is no reason for why the Insurers should have been disch. Comp 784. 801. 607. Park 326. Doug Thelapen vs Ferguson. 16. Earl v. Harvis

The next warranty is to sail with Convoy. Nothing will excuse it - like the other. If there was no Convoy ahead it is no excuse. The contract is to sail with Convoy. What is a Convoy? Must it be under the protection of a Commission of War? This is not the meaning. It must be a regular Convoy appointed for that purpose by (order of) the Government. It is not material whether this Convoy goes the whole distance or not, so that she sails under an authority appointed by Government.

Sec. Mercatoria.

then the first stops. Then you see, it is no matter how great the Convoy if it is not appointed by force: nor how small, it is if it is appointed by force. (Park 247.)

This Convoy is not to be from every port. The Convoy meet at a certain place, as e.g. at Spithead & the ships which are bound to that part of the world to which the Convoy sails, meet the Convoy at y^e place of rendezvous. Now suppose the Ship does not sail with Convoy from the port where she is insured & is lost before she reaches the Convoy, are the Insurers liable? Yes. She is to sail from y^e place of rendezvous with Convoy. 1 Park 443.

There may be two Convoys for the same trade. In this case, it is the duty of the Merchant to sail to y^e nearest Convoy - if on her arrival at the nearest rendezvous she finds the Convoy has sailed, she may pursue her voyage to join the other, & if she is lost before she reaches it, the insurers are liable. This is the Eng^l Decree which in this particular conforms to D. Mo. 1 Emery 184. 2 Str 1255.

To sail with Convoy means to sail with Convoy for the voyage, & the additional words "for the voyage" make no difference. They are immaterial. It means for the whole voyage. Sometimes indeed the Convoy is not to go the whole length directly. As if the Convoy is to go to the West India Islands, now when they get to a certain point they stop, & let the vessels take their chance, unless they can conveniently dispatch a part of their force to the different

Sec. Mercatoria.

Holland &c. go. it would take all the Goods come home
to gallant each individual vessel on the whole to her
port of destination. This then is sailing with Convoy
& the Insurers liable for loss.

The case of *Tilly vs. Turner* in Dony. was, viz. the
Ship was warranted to sail with Convoy. The in-
part of the voyage with Convoy viz. from Gibraltar
to the latitude of Cape Finisterre where the Convoy
stopped. (it did not go to the dividing point as in the
last case, the Qu. was, were the the Insurers li-
ble? ^{the goods did? they were not} It was not considered the whole voyage to Eng.
& the engagement was to sail the whole voyage w.
Convoy. It is true the warranty does not always
mean that the Convoy shall go to the Port of destina-
tion, as in the case above of sailing to the W. he is
where it is of custom to divide at a certain place.
In such case the insurers are liable. If there is a
convoy for a particular trade, & it does not go the
whole voyage, it is sufficient if the Ship is conveyed
as far as the Convoy goes. & the insurers are liable
if the Convoy is one appointed by Govt. The case in
2 H. Bl. 551 contains all y^e Law on the Subject.

There are some cases which fall within the
principles I laid down, which are in themselves a
little different from any of the cases I have stated.
Case. The general rendezvous for all the W. Ind. ships
is *St. Kitts*. A vessel was laying at *Sancti Spiritus*
to Eng. & if she had sailed for *St. Kitts* to join Convoy
& had been lost, the Insurers w^d have been liable. But

Sex. Mercatoria.

But there was a ship to be dispatched from the Convoy to bring up the vessels from Tortola, & she sailed under the Convoy of the Frigate. She lost her Convoy & did not get back to Tortola. nor did she get to St Kitts in time to sail with the Convoy. The winds being opposite, and she bore away for Eng^d. The insurers were not on liab^l, for it was considered she actually sailed with Convoy. This is not a case to show an excuse for not sailing with Convoy, for she did sail with a Convoy appointed by Government. For if she had actually sailed without Convoy, no matter for what reason the Insurers w^d be disch^d. Marshall 264.

Another case. Lisbon was the place of rendezvous. & a vessel was to sail from Oporto to Lisbon & she did sail under Convoy of a Sloop of war but lost it, & not being able to get to Lisbon she bore away for Eng^d. & was lost. The insurers were held liable. But both this & the last, were cases of sailing with Convoy. But if this vessel had sailed from Oporto on her voyage to Lisbon which she might do, but finding she c^d not make Lisbon, had borne off for Eng^d. & was lost, the Insurers w^d not be liable. 1 Bos & P. 111.

There are particular usages which it is no act of war to attend to. There are usages to sail from one port to another to join Convoy. As there is a particular usage & that is complied with, the insurers are liable. E.g. it is the course of the Trade, that vessels sail from the South of Spain, as e.g. in Cordova, & sail from there to Eng^d. & privileged to receive

Lex Mercatoria.

Convoy from China (i.e. Eng^d) to Amsterdam. You suppose a vessel is insured to Amsterdam. She sails to the Downs (Eng^d) with convoy. & for some reason she sails from the Downs without convoy, and is lost. now are the Insurers liable? Yes for this is the usage of the trade & they all understand it.

The Ship insured by engaging to sail with Convoy, implicitly engages that she will have sailing instructions from the Commandant of the Convoy; which means instructions that she may know his signals & in case she that is dispensed, that they may know where to meet. And if she has not these sailing instructions, though she sails with Convoy, the Insurers as a general rule, are not liable. For the Insurers depend upon the insured's getting these instructions.

I will state some cases. The Ship arrived at the place of rendezvous before the time appointed to sail. the Convoy was gone. but a man of war was still behind under whose auspices & protection she sailed, & overtook the Convoy & sailed with them but got no instructions from the Commandant. The Ship was lost & the insurers held not liable. Park 393 'the ground' of the decision was this. She sailed from her Port without (convoy) to meet the Convoy. She came across a man of War who was to have been a part of the Convoy, & she applied to him for sailing instructions but he c^d not give them, not having yet joined the Convoy. The Convoy being gone, & that being the time when she lost she could not sail with. This 74 years Ship, & some

Lex Mercatoria.

overlook them. She might then have gotten sailing instructions. but neglecting to do it. the insurers were held on to be discharged. There was no fault in her not getting sailing orders from the 74, for she c^d not, but the fault was in not getting them from the Convoy when she came up, for this she might have done.

It has been a great question whether sailing instructions are absolutely necessary in all cases. She must sail with Convoy (i.e. when warranted), but is she bound in all cases to have sailing orders? It appears to me, it is not absolutely necessary. It is a condition, precedent that she will sail with instructions, and if she neglects to get them, when in her power, the insurers are discharged. But if there was no such neglect, & she could not get them, the insurers, I apprehend, are not discharged. & the case above is not opposed to this opinion. Sup^d she is in the Harbour & owing to violent storms is prevented from procuring her instructions, & is lost after she sails. or if the Commandant on application says "I will give them to you in a day or two, you may sail along" & he does not give them to her & she is lost &c. the insurer is not discharged. It is clear that the engagement "sailing with Convoy" does not imply that there must be sailing instructions procured in all events, but to get them, if possible. 1 Bos & P. 5. 2 St. 164. Park 341 2 Sha 120.

Again she must not only depart with Convoy, but she must continue with it, if she can. It is not necessarily implied that she shall, at all events continue with the Convoy. for by the force of weather she

For Abolition.

may be removed away from them. But if the Master, who
his own negligence separates from the warranty the insurer
as are discharged. There was a case where the vessel arrived
at rendezvous & being a very sharp sailor, & the
Captain having a little business to do, waited 2 hours
after the Convoy set sail. thinking that he could easily
overtake them. The vessel was lost, whether before or
after she overtook them, I do not remember, nor is it
material. the insurers were disch^d for by an arrangement
made 2 hours the warranty "to sail with the Convoy" was
not complied with. Park 349.

If stress of weather is the cause of the separation,
it is a sufficient excuse, & the Insurers are not disch^d
in case of loss. Carth. 316. 1 Thom 340.

So sometimes when the vessel has sailed, & she
has parted, & c^t have joined but did not, the Insurers are
discharged. But where she is prevented from joining as
by a privateer, this is an excuse. If it is this neglect
that the Master does not join after he has been s^t
as it is, the Insurers are disch^d. There is a case where a
vessel was warranted to sail with Convoy from Rotterdam.
They sailed there two months before they had an opportunity
of sailing. The Convoy then came along & made a
signal for all the vessels to come out & join them. It
was a clear fine day, but the night was very dark,
& a French Privateer who had been watching took
advantage of this, sailed all night in company with
them, & in the morning took this ship - & she had
never received her sailing instructions, & the Rev. was

Sed. Mercatoria.

whether the insurers were disch^d. on the ground of her not having her orders. The Ct. decided the Insurers liable because there was no fault on the part of the insured. Thus far of course our.

Sept. 5th March 31st 1813.

The next warranty that the insured makes is that the prop^y is neutral. What is neutral property? It is the property of the subjects of any Country, that is in amity with the Belligerents. This warranty contains or it something more than barely that the property is neutral. - it also contains in it, that y^e Captain shall so conduct that he will not forfeit his neutrality - the Ship must be navigated according to the Laws of Nations.

In such case the Insurers will not be liable if the property is not neutral, nor will he be, if the neutrality is forfeited by the conduct of the Captain, and so he insured vs the barrating of the master. But I leave this consideration out of the case when I am laying down the Law. If indeed the property was neutral at the time of insurance, & becomes enemy property afterwards, the insurer is liable. E.g. Say the U.S. are neutral. a citizen of U.S. warrants the prop^y neutral & it is so & an insurance is made. & 5 weeks afterwards the U.S. become a Belligerent, & the property is lost, the insurer is liable, for this is a thing unforeseen. If the insured give false information the insurer is discharged. But if the property is warranted neutral, & this is the fact, the insurers are liable.

Lex Mercatoria.

no subsequent court will discharge them. *Booug* v. *Edens* & *Parkinson*.

But if it was *enemies* property at the time of the Insurance the war only then would be falsified. The above case in *Booug* was this. The insurance was made on the 28th of Nov^r at & from *L'Orient* to *Rotterdam*, 'ware with a neutral Ship & neutral property.' She sailed on the 11th Dec^r & on the 20th Dec^r hostilities having commenced between the Eng^l & the Dutch, the Dutch ceased to be a Neutral Power & the Ship & Cargo ceased to be Neutral Property, & she was captured by the Eng^l on 25th Dec^r & condemned as lawful prize & the Insurers were held liable.

A judgment of a Foreign Ct. that the property is not neutral but belongs to an enemy is conclusive evidence that it is not neutral, & however unjust the judgment may be, no inquiry can be gone into to show the judgt^r erroneous & the property neutral. This is the Law of Nations, & all the governments in Europe have acquiesced in the principle except France. *1 Emmeron* 488 or 488. It must be the judgt^r of a Ct. of admiralty - a Ct. competent to try & decide the *Du*. It must not be any new fangled jurisdiction but by a Ct. of Admiralty. This Ct. is common to all countries.

Under this head there has been a great question arising from the attempt made by France to establish Consuls at Foreign Ports who took upon themselves the liberty of deciding as to prizes whether good or not; & the *Du*. was whether this was a Ct. of competent jurisdiction?

Lex Mercatoria.

There were many cases of this kind when the property was confiscated in Spain before the war, where the French had established a Consul. This has always been considered a judge of a Ct. of no jurisdiction over the subject matter, & in all cases the Insurers have been held liable. You may see a case of condemnation in a port of, Norway, by a French Consul. & the Ct. being cited before the Ct. of N.B. they determined that the Insurers were liable. The proof was no evidence that the property was not neutral. D. 15258. But if the Ct. is a regular Ct. & it appears from the face of the proof that the property was not neutral, there can be no farther enquiry, it is conclusive evidence, & the insurers are discharged. Bowers & Co. 314.

This rule has been established by the Commercial Nations, except France, for a long time.

So a condemnation as "good prize" has been held to be good evidence that the property was not neutral. Park 361.

Now if the specific ground of condemnation set forth & it is usual to set forth the grounds is a distinct ground from its not being neutral, i.e. the ground set forth as cause of condemnation, does not necessarily imply that the property is not neutral, then it does not falsify the warranty, & the Insurer is not discharged. E.g. an American Ship was insured as neutral from London to Virginia. She was captured by a French Privateer & carried into Guadaloupe. The sentence of the Ct. was that she was destined to the

Sex Mercatoria.

Eng^l Islands & had 80 Barrels of Powder on board. Not because the 80 Barrels of P. were contraband goods, but that makes no difference. She was not condemned as not neutral. Now if she^{had} been condemned on this ground that judgt. would be conclusive evidence, & must have been adhered to. Now what did y^r judgt. of condemnation speak of in this case? Why that she was destined to Eng^l Ports. Well you cannot infer from this that she was not neutral. The judgt. proves no such thing. She might have been bound to Eng^l Ports & still have had neutral property on board. In this case the Insurers were made liable. You see the ground of the decision. 7 T. 16. 523. And you may see a great number of such cases, where the insurers were made liable, & when they are made so the adjudication you will find of the Foreign Ct. did not express that she was not neutral's property. They have now got more cunning, & if they have any interest in it, they will adjudge directly.

If the sentence is ambiguous, so that you cannot infer with certainty that the property is not neutral, the Insurers are liable. Doug. Bernadi vs. Mottley.

In short, if she is warranted to be neutral, she is so, until proved to the contrary. When she is captured, the sentence of condemnation is only way you can prove her not neutral. & Case. The judgt. decides that the Ship was condemned as prize, & then goes on to state that the Goods were

For. Mercatoria.

consigned to enemies, & it was strongly suspected that the Capt. threw his papers over board. Now this, with one of them prove that the property is not neutral. They however condemn the Ship, & the Insurance was held on cables. But a sentence of condemnation that it was enemies property, is conclusive.

In the case of *Jager vs. Hyndman* 10 R 681. At the time of that decision it was thought impossible that the Court practice such iniquity & there was no principle of which Nations were more jealous than that the judges should be conclusive. But since that, there have been several cases where the judges have not been held conclusive, & there has been general attempts to subject the insurers on the ground of prize. There has been it above case. It is also in Marshall the margin note of the case is this - "By the sentence of a French Court of Admiralty it appeared that the Ship insured, was an American had been condemned as enemies property, for want of having on board a *rol d'équipage* or list of the crew, such as is required by a marine ordinance of France, & adjudged by the Court to be requisite, within the meaning of the Treaty of Commerce between France & America: held to be conclusive evidence of the want of neutrality, the in fact the Ship was American." 53.] This case differs from the one above because here it is decided that she was enemies property, but in that case they did not decide that she was the property of an enemy. but they condemned her as prize, & then state the reasons.

Sex. *Merced*.

Now it is a matter of S. M. that when your papers are not brought into L. altho' it furnishes prima facie evidence that the property is not neutral, yet you may show by proof that it was neutral.

You will observe that it is never a discharge to the Insurers when a ship is condemned, not because she has gone contrary to the laws of Nations, but, because she has gone contrary to the decrees of a Belligerent, whose it governs their own subjects: & whose decrees they will enforce. & even if a capture is made under these decrees the Insurer is not discharged. The decision went on the ground that, by the decree it was enemy property. In the above case there was a decree that she was good prize - but there was no decision according to the laws of Nations.

Now there was a ^{decree} Treaty providing that any vessel to be considered neutral should not have on board an officer of an enemy's country, & that she must have a role d'équipage, or list of the crew - a breach of either of these provisions was considered as cause of condemnation - Now as the vessel had a foreign officer, & no list she was accordingly condemned. See Dr. Kenyon's observations in the case above, in p. 16 & also in Abbot's 297. Now you will mark the distinction, that, when they decide, & state the evidence, but do not say that it is enemy property, if that evidence will not bear them out, the insurers are not discharged.

You will observe that no fact recited in the sentence is conclusive, though it be part of the

Sec. Mercantile.

principles in which the sentence is founded. It is nothing but the sentence of condemnation which is conclusive. 9th Dec. 192.

As to forfeiture of Neutrality

The thing which makes the greatest difficulty on this subject is the Question as to the right of search. The Q^u. is, whether, a neutral, before resisting y^r right of search, & taken & condemned not because she is not neutral, but because she resisted. the Insurers are liable? or whether resisting will not discharge them as furnishing conclusive evidence of antineutrality? It seems that there is no one Q^u. upon this for y^r right of search must be acknowledged or avowed by parties. No nation ever yet contended that contraband goods could be carried on neutral bottoms, & if so, there must be a right of search, or it never could be prevented. neither has any nation ever yet contended that a blockade port not be entered without incurring a liability of confiscation. Of course the right of search is unquestionable.

But there is a Q^u. of a different kind. Suppose a vessel really neutral resists a search & is taken & condemned so that ground the Insurers are discharged? But the Q^u. I speak of is this, whether free ships shall make free goods. or in other words, whether the carrying of property in neutral ships shall make the property neutral. or whether when a belligerent searches a neutral & finds contraband goods on board, can the ship can be carried into port? The first claim that a belligerent.

See Mercatorius.

not take enemy property, in neutral bottoms, is in Hecker's in 1754. "This is the first intimation of the kind. The oldest collection of the marine laws is the *Corpus bado de mare*. The words are these. "If enemy goods are found on board a neutral. Ship they may be taken." Grotius lays down the same rule in the same words, no doubt copying it - & in all his work, we find he does not intimate a different opinion. The eminent Dutch writer, Bynkershoek lays down the same doctrine. There is no opinion to the contrary except Hecker's. Not long a later writer recognizes it as the Law of Nations. Battell, a modern French writer, by most eminent of any, lays down the same doctrine both as to the right of visitation, & the right of capturing of enemy property carried in neutral vessels. Battell cites all these authorities. See Battell, vol 3. Article 7th & propositions 113. & 114 of 7th article.

We find as far back as 1553. (Pomajou 450?) that in France they made a decree that the Ship as well as the goods should be forfeited, & this decree remained in existence almost a century. In 1668 they altered it, & said the goods sh^d. be liable. enemy goods. This continued till 1681 when the old law as to forfeiture of the ship was restored. They made some alterations in 1704. I do not know what. In 1744 they restored the old law & decided that the goods only should be liable & not the ship. But further on every treatise & commercial writers they refer to it as existing. It is recognized in the treaty of 1782. between America & Holland.

Sen. Henderson

as being qualifying it that that there shall be no
of the ships when they are in company with an armed
vessel. They allow the same operation so far as respects
themselves by this qualification. In Spain in a late
decision the same rule was adopted that enemy
goods on board of neutral ships are liable. There ap-
pears to be a decree of the States of Sweden in 1664
where they recognize this to be the law.

Have there been no decisions to the contrary?
There is not Scintillas gives to be given to the contrary ex-
cept one single decision some years ago in the
County. Part 363. The decisions since have always been
conformable to the Law of nations. Eng^d writers say
that that case is not intended to be opposed to the gen-
eral Law. but they can never satisfy the mind if
they are correct. - it is really a case in opposition.
The case was this. It was a Tuscan ship, she had
property on board which was Eng^d. Eng^d & Spain were
at war, of course it was Eng^d property. Span-
ish ship demanded her right to search, she resisted
even fired at the Spaniards. She was captured carried
into a Spanish Port & condemned, & the condemnation
went on to state that as the cause, that she resisted
the right of search contrary to the Spanish ordi-
nances. If that ordinance was different from the Gen-
l. the Eng^d decision was correct, viz "that the insur-
ers were liable, & that she was right in resisting, & it is
no forfeiture of her neutrality". But that ordinance is
in conformity with the Law of nations, of course she

For Mercatoria.

Spaniards had a right to search. But the case might have been determined otherwise. for the Spaniards appeared under Algerine colors it was in the Mediterranean. Such being the case there was no pretence of right at all, for sh. was not bound to submit to a search by an Algerine private, & such the Spaniards appeared to be. There was then no evidence that the ship meant to resist except the Decree. - But as it was determined on the Spanish Pt. we are not at liberty to question it. & therefore the Eng^l decision that the insurers were liable &c cannot be justified. But this decision has been since overruled. & by a course of decisions the Law is now well established. The last case is in 8 T. R. 23. See also in Ward & Hall 323. it recites all the other cases & contains all the Law on the subject. I know of no later Case.

Many individual Nations looked upon this Law, as respects the right of search, as injurious. Commercial Nations, powerful at Sea are anxious to retain the Law. Holland was once a great Commercial State. & one time France had great power on the Ocean. & Eng^l now claims to be mistress of the great highway of Nations [witness the vicious ^{american} privateering & the Privateer; the United States & Macedonian; the Constellation & the Java; the wasp & the Frolic, & the Hornet & the Peacock. &c.] But Russia, Sweden & Denmark were less powerful, & they determined in 1780 that they would change the Law by force, & found the system of the armed neutrality. It did not at y^e time

See. *Neutralized.*

produce a warship by France or Eng^t. But since that time, the power of France failing on the Ocean they have countenanced the armed neutrality. It had an effect however. The Eng^t relaxed the principle, but made no concessions, & never gave up the principle. They were assuasive to the practice again. The armed neutrality was introduced a second time, and we all know how it was crushed by Lord Nelson. I have collected all I could find on the subject & it is clear that all Nations recognize, & sight of search in Month's. 6. 6. 1813.

Section 1st April 1st 1813.

It seems from what I have said that y^e warranty that a Ship is neutral, or that the property on board is neutral, if it turns out that it is not so, it is clear that the Insurers are discharged. It matters not whether the loss happens in consequence of its being, or not being neutral - for if it was not neutral, y^e insurers are disch^d. from all loss happens how it will. For it is a warranty that y^e prop^y. is neutral, & on this only the liability will attach.

The warranty that "she is neutral," implies y^e altho the Ship or prop^y. may be neutral, yet if she is under such circumstances as not to be protected from capture, the Insurers are discharged. As e.g. if she was carrying contraband goods, or going to a blockaded port, having notice of the blockade, altho the prop^y. on board is neutral, yet it was not such as entitled her to protection. The marine Law is, that in such case the Ship may be captured & the Insurers are discharged.

Sex Mercatoria.

It also seems that the ship is neutral, but carries enemy property on board, there is no question about its being neutral. The property is liable according to the Law laid down in the last lecture. The right of search exists & she may be captured. When such a ship is taken & carried into port by a Belligerent & condemned, altho it can be proved that its property is neutral, yet if the sentence of the Ct. is, that it is an enemy's property, how can unjust & piratical it may be, the judge is conclusive that it is not neutral & the Insurers are discharged.

But if the judge is required not for a breach of the Law of Nations, but for a breach of some particular ordinance to the Insurers are liable. This ordinance is no part of the Law of Nations. The Law of Nations may be altered by treaty, as respects the nations parties to the treaty; & if it is, the insured ought to be prepared to navigate according to its provisions or that treaty. It is a breach of the warranty if they are not prepared. For it is a condition precedent, that she shall be navigated according to the treaty, & that the insured will be prepared with all documents papers &c. required by that Treaty. This is only calling up to view what has passed. And in this case the insurer supposing that the insured will be thus prepared takes his Premium accordingly. The doctrine is supported in these propositions.

First, that the Belligerents have a right to search neutral merchant vessels not.

Sex. H. H. H. H. H.

Men of war. There is no instance of searching, or an attempt under cover of government to search a man of war of a neutral. - for a national flag will not suffer herself to be so disgraced. even if she is carrying on a trade with a belligerent. There was one instance of an American ship of war being searched by a British man of war. -

No neutral has a right to resist - the penalty is condemnation - and the other have this as a caution of the war. If neutral sailing on the coast of the insurers, are searched by the insurers. - Marshall III.

I will not notice the violation of the neutrality by sailing without the proper papers. It is sometimes said the parties on this subject are contradictory, but I apprehend there is not the least ground for this in the cases themselves, tho' there may be some things which have fallen from the parties that appear contradictory. This neutrality is not to be exercised without the proper papers - now it does not follow that when they sail without the proper papers the Belligerent can for this condemn. Suppose it turns out on the trial that the property is neutral, but they have not the proper evidence in the spirit of the law of the neutral - can they condemn? No. I say they cannot. I mean they cannot on principle, tho' there have been many such condemnations. But it does not follow that the insurers are liable, for the insurers runs a risk by it. Now if there is any obligation on the part of the insurers by treaty that the

Six Mercatoria.

insured shall carry such I shall papers & he does not, the Insurers are discharged whether the ship happens to be captured or not, or whether the condemnation was lawful or not. But if the Belligerent has an evidence or evidence of their own, requiring such papers, condemns her for not having them the insurer is not discharged. III.

I have remarked that certain papers are required. The 1st is a Passport. which is a license from the authority of the neutral State, for the Captain to sail.

The II^d is what is called a Bill of Lading. This is only a specification of the nature & quantity of the Cargo. Say e.g. an American is on the high seas, & a belligerent comes across her. he shows his passport & a letter. very well - but say they this is not an American built vessel - it is English. In such case they ought to have a bill of sale of her, or a certificate of her being captured; otherwise there is a ground for reasonable suspicion.

The III^d is a Roll d'equipage, or what we call a muster roll of the Seamen. - The IVth is a Bill of Lading. it is the Captain's receipt. He must have the Bill of sale containing the prices of showing the property on board to whom it belongs &c. & the Logbook keeping an account of the voyage from where she sailed &c.

Now if she has all these, it goes to show she is neutral. - it is prima facie evidence of that fact, & if the papers are not forged she is neutral. If she has not these on board, it is ground for suspicion and warrants a detention by the Belligerent. the not a condemnation - if she is without them it is prima facie

Sex *Arcturion*.

evidence only that she is not neutral. it is not in
dispute for she may have lost her papers & after
all this she is proved to be neutral, she cannot be con-
demned. And all the a great loss happens by her being
carried out of her course, & detained a long time, yet
there can be no recovery of costs of the capture - and she
may be condemned & obliged to pay all the costs, for it
was her own fault that she had not the papers on
board. Now are the Insurers liable? No. It is a risk
which the insured have no right to impose on y^e in-
surers. Further. She must be navigated according
to, or in conformity with the Treaty Belligerent & the Neutral - not according to the decrees.
Suppose there sh^d be a Treaty, as there is between Amer-
ica & France that there shall be a rule d'equipage.
Now it was never supposed that this paper was ab-
solutely necessary by the S^t V^o. - but it is required
by Treaty. Now the Ship ought not to be condemned
for want of this paper, if otherwise she can prove her-
self neutral. But the insurers have a right to claim
that the insured shall carry this paper; for he insures
on the implied engagement that the insured will con-
form with the Treaty - for if he does not the risk may
be increased. You may see a case in 7 J. 10705. which was viz.

In the Treaty between America & France it was
stipulated that every Ship (in case one of the Contracting powers
at war) which was to be of the neutral, should move
in ball without a passport i.e. a license to sail from
the authority of the neutral Nation. The case was this

Lex Mercatoria.

The Ship & Cargo were American. The insurance was on the Ship & goods from London to Guernsey, from thence to the Coast of Africa, during her stay & trade there, & also from thence to her ports of discharge in all parts of the British West India Islands & America. The Ship & Goods were warranted to be American property. She sailed from London to Guernsey without a passport. She arrived there safe & at Guernsey procured a passport & held it continually till the time of her capture.

A French Privateer came across her on the Coast of Africa & captured her. The Captain showed the passport to the Commander of the Privateer & the time of the capture. She was taken however notwithstanding there was no ground for capture; carried into a French Port & condemned. For what they condemned her God only knows. For having shown her passport there was no principle on which the condemnation could have been made, as she proved herself in every respect neutral. The question was, were the insurers liable? The Capt. did not happen because she had no passport, for she had one. But it was a condition precedent, required by the treaty, that she should sail with passport. But she sailed from London to Guernsey without passport. She been taken between these two ports & evidence of her neutrality would have been wanting. Therefore when she sailed the warranty was not completed. Now this is the ground & it is important to notice it, as there is nothing contradictory in it. The insurers had a right to have that property protected by a passport.

Lex Mercatoria.

when she sailed. No liability was attached as it was really a condition precedent, was never complied with.

See a case in Park 362, which was this. There was a French ordinance (as part of the Law of Nations & a Treaty) that every neutral should be liable in capture when the supercargo on board was a native of a neutral country - or if he was a subject of the belligerent. A Portuguese ship was taken & the supercargo on board was a Scotchman. She was condemned under this ordinance. now were the insurers liable? Yes, for it was merely an ordinance of France. There was no treaty requiring that Portuguese ships should sail with a native supercargo. Now had this thing been regulated by treaty, & they had not conformed to the provisions of that treaty in this respect, the insurers w^d have been discharged. In the above case the Insurer says you have increased my liability - But the answer to this is - this was a regulation existing not by the Law of Nations, or by treaty, but by a mere ordinance, & we (insurers) are not bound to know or take any notice of these ordinances. The Law of Nations, & our Treaties are our guide, & to these only we bound to conform. Of course the Insurers must be liable. For as if it was by L. of Nations or by Treaty, the Insurer w^d be disch^d.

Another case. By the Treaty of Utrecht an agreement was entered into between Holland and France so that a certain document should be carried. The property was warranted Dutch - that is neutral.

Sen. Mercatoria.

but this document was not on board. She was taken & condemned & the action was tried vs the insurers & y^e Dec. was whether they were discharged? The Ct held they were, for the Treaty was not consistent with Part 338. In the course of the argument there are some things which have dropped from the mouth of E. Means^r. There was a national ordinance, the same as the Treaty, & it appears that E. Means^r said the case would have been the same if this document was required only by that ordinance. But this is clearly a mistake in the Reporter, for E. Means^r is thus made to contradict himself. The doctrine then is this - a breach of the Law of Nations is a forfeiture of neutrality - or if there is any allusion to y^e Law of Nations made by treaty, a noncompliance with the provisions of that treaty, by the parties to it, falsifies the warrant of neutrality. - But a breach of a marine ordinance of any particular nation, does not falsify, & that ordinance is not warranted by the Law of Nations, & on this ground it is that in all the cases of condemnation of American vessels upon the French decrees and British orders in Council, the insurers have been held liable. The same doctrine in Eng. 65. 1843, 1844, 1845.

In all cases of these ordinances made by a Belligerent, they are all founded in injustice, as it respects y^e neutral - it is giving Law to a neutral, & is an arbitrary stretch of power. But the insurers are liable, & that is y^e great object. I have the judge read the case above in Meantime & T. 1845. & remarked that the argument in it were certainly the most luminous he has ever seen.

Sec. Mercatoria.

Of Representations.

If a representation is not true, it avoids the Policy, but it is a different thing from a warranty. If representations are falsely made wilfully & for purpose, they are fraudulent. But they may be made innocently, & in either case if they are not true, it avoids the Policy. For the Insurer takes his premiums according to the representations & puts full confidence in them, & if they are not true, he ought not to be liable.

These representations are by Parol or by Writing: the more commonly by Writing. I said before, that if a representation is untrue, whether wilfully or innocently made, it avoids the Policy. This sh^d. be qualified: it avoids the Policy, if the circumstance or fact is material. If it is immaterial it will not avoid the Policy. It is not like a warranty, which is a condition precedent.

A wilful misrepresentation is a fraud, & avoids the Policy. e.g. the insured knows that y^e ship had sailed, made a representation that y^e ship sailed at such a time, conveying the idea that she had not sailed before. Now if he had said "she had sailed," & added nothing more, the Insurer would naturally have inquired "when did she sail?" This was a false representation. Black 176. And keep this in mind, when there has been a false representation of a material fact, no matter how the loss is occasioned the insurer is discharged. Suppose, e.g. there was a representation that the ship was neutral, (not a warranty) & that was false. The representation was made for y^e purpose of getting

Lex Mercatoria.

The insurance at a town, where the ship was lost on a Rock, notwithstanding, that the Policy is void. If the case was decided by that false place, no matter in what way the case happens, the insurers are discharged, for their liability never attached.

There are one or two cases of which we are not apprized by Element any writers. you may see one case in Cowp 787. There was no warranty as to Policy & the insured wth not even the fact to be so. but he said "he believed" it was so - & it turned out otherwise. Now the difficulty is, how can you ascertain a man's belief? To insure upon the belief of a man is a little too loose - and on the other hand, altho the insured did not know, yet he guessed & it might have induced the insurer to insure. The Ct held that the Policy was binding, & the insurer not discharged. But I believe the Ct ought to discharge the insurer in such case, for if an honest man comes & tells the story & says he believes it, if insurance is imposed upon if it is not so. In common business actions the law is well settled. an opinion merely is of any avail; but I repeat, that I think the law is otherwise in the marine & in the insurance ought to be discharged for the opinion of an honest man of sound judgment. no doubt operates on the mind of the insurers.

In another case the insured said "The ship left the Coast at such a time." He knew nothing of it. now who reported it? no one in particular. It might operate on the insurers' mind, but the Ct said he was not discharged. This is going one step further in the direction of

Lex Mercatoria.

Letter in the Post Office. It contained a true statement, at the time - but before the Letter went off, he heard that the vessel was lost. The Letter went on and the insurance was made accordingly. - The insurer was bound to be discharged, for it was the duty of an insurer to have retained the Letter from the P. Office after he recd. information of the loss. 10 T. R. 12.

A great question. Suppose the representation differs really from the Policy. The Policy gives the voyage a greater extent (& of course makes it more dangerous) than the Representation. Now the question is, are the Insurers discharged? i.e. provided the vessel pursues the voyage according to the Policy. The case was this. A French Ship was insured in Eng^d to go a voyage to the French Islands, from thence to the Indies, to China & Persia, & then back again. This was the Policy - but the representation was to leave out the voyage "to China and Persia". It went her voyage & on her return home was captured. & of the question was, were the insurers liable? The Court determined they were. The insurers must have known they were bound by the Policy. the owners had a right to continue a voyage as extensive as the Policy. there was no imposition. The representation could not control the written instrument. Doe v. Bage v. Fitch

Another case where the insurers were held liable, & on first view it w^d appear that they ought to have been discharged. i.e. a Ship was insured from London to Antwerp in France. nothing done but when she cleared out, she was cleared out from London to Rotterdam.

Lick. M. M. M. M. M.

and in the Policy, she had liberty to touch at Ostend. She sailed from London directly for Brantley (never sailed for Ostend) & was lost. The insurers said we are imposed upon but they were held liable on the ground that this was the custom of the trade to clear out for Ostend when they meant to sail for Brantley & this every one knew. It was done to save the duties which were double on goods when they came from Ostend to what they were when they came from London. & the French merchants all knew this. It was done to circumvent this double duty on Engl. Goods. The Court held there was no fraud on the insurers. (March 182.)

Concealment.

Not only a misrepresentation but a concealment of any fact, which ought, in good conscience to be disclosed will avoid the Policy. The concealment must be of some thing material - the insured is bound to disclose it, whether the Insurer enquires of it or not. When one goes to insure a Ship it is taken for granted, that the Ship has not yet sailed - if she has sailed, it is the duty of the insured to make it known & if he says nothing about it, & therefore does not lie, yet the Policy is avoided if she has sailed. He ought not to conceal the nature of the employment. Or suppose the insurer asks, "insured, how long since the Ship sailed?" So long says he. But he has since heard from her, & then she was in danger, & of this he does not inform the insurer, the policy is void & the insurer discharged, & this the insured & his agent ought to have told the truth. 20th Nov 1820.

Lex Mercatoria.

It is a maxim of L. M. "vigilantibus non dormi-
entibus lex parat". this does not apply to L. M. for
it is a principle of L. M. that the carelessness of the in-
surer will not avail the insured. you may see a
case in Park 182. where the insured told truly what
he believed, which was that the vessel would be rea-
dy to sail on the 24th of the month & the insurance
was made. She got ready & did sail on the 23rd. The in-
surers were discharged. This appears to me carrying
the principle too far. I think the true construction
sh^d. have been that sh^d. sail by the 24th & if possible
sooner. (if there had been a warranty there would be
no Qu. about it). This case shows how exact they are.

A case of Cunning. an insurance on a
vessel that had gone to Africa. The insured told the
insurer he had not heard from her for a long time -
but his last information was, that on a certain day
say 20th May, she was on the Coast of Africa - this
was true - but he heard at the same time, that she
left the Coast on that day & put to sea. Now if the
insurer had known of this he would have raised
the premium. for there had been time enough since
that day for her to have arrived. & as she had put to
sea on that day & had not arrived, he would have
suspected that she was lost. The insurer was disch. Park 181.

Another case. A Merchant had a vessel at
Sea. & a Gentleman a friend of his had heard a report
of several vessels being captured or lost, which made
it probable this vessel was also lost. & he came to the

Lex Mercatoria.

Merchant, Plummer, not finding him at home, he informed the Clerk. The Clerk went off immediately & got her insured (supposing that his employer would approve of it) but mentioned nothing of the probability of her being lost. Now there is no law but that if the insurance had been procured by an agent legally authorized it would have voided the Policy. But in this case, it was said the Clerk was not legally authorized. The Ct. however decided it was a fraud, & the insurers were discharged. 209.

Another case. The owner of a Ship in London received a letter from his Correspondent in Lisbon, that his Ship was ready to sail. Soon after a Ship arrived at London, who sailed from Lisbon in Co. with his Ship. but they had parted in a gale. This created an alarm that the Ship was lost. He waited a few days, & then procured her insured. He showed the letter from his correspondent to the insurers stating her readiness to sail but did not inform them that she had actually sailed in Co. with a Ship which had arrived a few days before. The Ct. decided that the Policy was void, and the insurers discharged. 176 p. 11. 372.

Another case where the Insurers were discharged because the Ct. thought a certain part material which had not been disclosed, which part the broker conceived of no consequence. The Broker was a respectable man & his fraud was imputed to him. Lang. & Hilkey vs Wilkinson.

It will be observed that he is discharged & paid by as they are, i.e. as doubtful. E.g. a man has been

See Mercator v. The

a story that his vessel was taken. no reliance to be put on the report. it was a mere story. he got his insurance but did not mention the report. She was afterwards lost in a different way - say, in Storm. But because he had not disclosed the report as it was, the insurer was discharged. The same decision in *Law & Equity*, 2 P. Wms 170. 2 Stra 1183.

Now a private decree contrary to the Law of Nations, ought to be disclosed by the insured, if he knew it, & the insurer did not. The insured is not bound to know it. But if he does know it, & does not disclose it, & the insurer is ignorant of it, he will be disch^d. 2 Stra 1183.

So on the other hand, the insurer must not play tricks. if he does he is not entitled to his premium. e.g. a man went to an Insurer, to procure an insurance on a vessel he thought was lost. the Insurer had just heard of her safe arrival, but the insured had not heard of it. The insurance was made on a high premium. The insured recovered it back on the ground of fraud.

Secur^y 10th April 2^d 1813.

There are certain things agreed on all hands that may not be disclosed. They all proceed on the ground that the fact is as well known to the one as the other, & if it is not, they have all the means of knowing it. There is no fact within the knowledge, or within the means of knowledge of the one & not of the other, which would increase the risk, but ought to be disclosed. But what is mere matter of speculation, need not be disclosed - and thus it is as improper to do it. Suppose the

Lex Mercatoria

insured expects war will be declared & when he goes to the insurance office he finds they are taking peace premiums. He need not tell them that it is his opinion there will be war. for the Insurers judge for themselves on this subject. There is no impropriety in it - he might be laughed at for his opinion.

But if he has heard war was declared, & the insurers did not know it - & he observes the insurers taking peace premiums, he is bound to disclose this information. if he procures an insurance without disclosing, it is a fraud - a concealment of what in good conscience ought to be disclosed. Or if there is a rumor of war or a rumor of any thing else material, & the insurer has not heard of it, he is bound to disclose it, as it is. But his opinions he may keep to himself. So he need not tell the Insurers of the prevalence of certain winds (as g. monsoons, &c.) or the voyage for which the ship is insured. These are facts which the Insurer is presumed to understand. For the same reason he need not tell the Insurers there are hurricanes &c. &c. This is very well discussed in Burr 1909. 1132. 12. 594.

There are certain cases of insurance where you need not disclose facts & that is when the insurers are insured you need not disclose to the Insurers any intended enterprise, as when you are going to the of importance that it be kept a secret. and the insurer is not imposed upon, he takes his premium accordingly. In other cases the insurer is bound to tell the voyage of any particular business to be done by the ship.

Sea Warranties.

must be disclosed. In fact he must disclose every thing material, relating to the voyage. See 1220.

There is no obligation on the insured to make known what has taken place by a Foreign ordinance, if he does not know of it. i.e. he is not bound to know it, & the Law presumes he does not. But if he does not, & the insurer does not, he is bound to disclose it. See 144. 3 Burr 1905.

Of Implied Warranties.

There are certain implied warranties on the part of the owner of the [Ship], which if not complied with, the insurers are discharged. As to the goods: owners of them always have their remedy as the proprietors of the Ship.

There is an implied warranty that the Ship is Seaworthy. What is meant by this? - Why that she is a staunch vessel, capable of resisting the ordinary dangers & perils of the Sea. She need not be the strongest vessel in the world - but such an one, as men of discretion would say there was no doubt of her being able to resist what Ships ordinarily will resist at Sea. If judicious persons would say there was any hazard in her going out, she is not seaworthy. If they say she is seaworthy, & there is a secret defect, perhaps the insurers would be bound by their opinion, tho they might perhaps be discharged. The insurers undertaking is not in favour of extraordinary accidents, of course if she is not seaworthy, it is not extraordinary that she should be lost. & the insurers are discharged. So that if there is latent defect, existing previous to her sailing, notwithstanding this

Lex Mercatoria.

when the insurers are discharged. There was a case come before our Court, where every one thought the vessel was strong & safe - & when they put to sea, she (without any known cause) went all to pieces. They got her intact but with great damage loss. There never was a vessel appeared more sea worthy. But when they took her apart they found the Iron in all her bands was rotten & worthless. The insurers were discharged - for she was not sea worthy. This is agreeable to ^{the} ^{law} ^{of} ^{the} ^{sea}. I suppose if she had been surveyed by persons appointed for that purpose, & pronounced sea worthy, it might have made a difference on this point - but that is not ordinarily the case.

Suppose a Ship is lost on her voyage by becoming leaky &c: & you cannot attribute it to bad weather. This furnishes a presumption that she was not sea worthy - but it does not follow of course that she was not sea worthy.

If a Ship is lost in a Storm & the Insurer claims that she was not sea worthy, the owner presumes that she was not, but on him. There is no presumption that she was not sea worthy for a storm may destroy any vessel. If it can be proved that she was not sea worthy, tho' she is lost by storm, the insurers will be discharged. Ignorance or innocence of the insured avails nothing at all. They may believe her sea worthy - if it turns out that she was not, the insurers are discharged. Boothall 368. 369.

The case in Manshall ³⁶⁸ was this. It was

Sex. Mercatoria.

agreed by the Parties that the Ship was sea worthy - but contrary to their expectations, she was not - but the insured knew nothing about it. & this test up the Qu. whether this was a risk that the insured was to run, or whether it was for the insurer was discharged? It was determined that she was not sea worthy the insurer was discharged. The liability depends entirely upon the Qu. is she seaworthy?

There are many cases where vessels are insured a crew. Both parties wholly ignorant of the situation of the Ship. But the L. M. is that she must be seaworthy. The same implied warranty exists here as in the cases above. Park 221. & Bur. 2304.

By being sea worthy you are to understand that she is to be sea worthy at the time she first sailed & a departure. If she is sea worthy when she sails becomes disabled afterwards (as by Storm &c.) the insurer is liable for all loss. When we say a vessel was not seaworthy, we mean that she was not so at the time of her sailing. There is a case reported somewhere (see excellent author J.T.) which I have seen, which was a remarkable case - A vessel at the time she sailed appeared to be the best vessel in the Fleet, but before she was out 6 hours, she filled with water, altho' it was fine weather. It was never known what was her sudden distemper. [Prove C. might call it the Perfection in J.T.] It was determined she was not seaworthy.

The Ship must not only be staunch, but there is an implied warranty that she will be properly

Lex Mercatoria.

much, & if any loss happens in consequence of the
not being well manned, the insurer is discharged.
By being properly manned, is meant that she must
set out so not that they are obliged to continue so
for by sickness &c. &c. this may be impossible. And the
Captain should always take a pilot on board when
he goes into a Harbor. If the Capt. goes into a Harbor
in any case without a pilot, & a loss happens I do
not believe the insurers w^d. be liable - it is not acting
prudently. 7th 2. 160

There is also an implied warranty that the
Ship shall be well provided with Provisions and
Water for such a voyage. Such provision as is ordina-
rily made. Now they have gone from N. Haven to the
W. Indies in 16 days - but it is not sufficient to provide
provisions for 16 days for they are frequently 30 days
on the passage. But they are not bound to provide for
100 days because some vessels have been thus longer
making the voyage. It must be reasonable.

When the Ship is specified there is an im-
plied warranty that she shall not be changed, ex-
cept in case of necessity (at water) - if she becomes dis-
abled, she has sufficient means to put her cargo on board
another Ship. Suppose she is bound to a port far distant
from the one where the goods are to go, & meets a Ship
going to that Port now it is the best thing the Capt.
can do to change the goods & put them on board the latter.
And the inquiry is "Has the Capt. done the best thing
possible for all concerned?" If he can put them

Lex Mercatoria.

on board, he does right, tho the vessel is not going to the same port. in case. The voyage was at. & from France to the E. Indies. The vessel was shipwrecked on the India Coast - the goods were in part saved - the Captain sold all the goods that were saved & used the money in other goods, & put them on board another ship & sent them back to France. It was held that the Capt. did the best in it, for all concerned & that the insurers were liable - & that y^e policy protected these goods. 7 T. R. 611. note.

There is a power ^{given} always vested in the Capt. to employ another ship to finish the voyage & many times it is important that he should do so. tho sometimes he has not the liberty. Suppose the insurance was from N York to Martinique & he got into some port in Guernica & was going no further. Now it is y^e duty of the Capt. to send these goods from there to Martinique on another vessel. There is this attending all such transactions, viz. that all the expenses the Capt. incurs for salvage in saving the goods, unloading them for the purpose of repairing the vessel & loading them again, or any increase of freight, fall upon the insurers. So that frequently happens that the insurers are made liable for more than a total loss. These expenses are incurred for his benefit - & tho afterwards there may be a total loss, yet this is unforeseen; & it is reasonable to sh^d. pay for this loss, & y^e expenses incurred in endeavoring to save the property. A case of this kind in Conn. (perhaps on a voyage ship. ; Emergon 432. 578. 681.

But the rule of insuring on the specific ship is

Lex Mercatoria.

dispensed with in those cases where the party knows nothing about her, as if she is abroad; then the insurance is on the Ship or Ships. out of this has grown a Quarta See 2 H. Bl. 345.

There is another implied warranty that if a Ship shall be navigated as the Law directs. It is not to be navigated contrary to the Laws of her own Country; & she must be navigated according to the treaties between her own & Foreign Countries. But you are not bound to navigate according to the ordinances of a Foreign Country, when there is no treaty, altho you know of the existence of such ordinance as if a Foreign Government sh^d. make a decree that vessels sh^d. carry certain papers - there is no implied warranty on the part of the insured that she will carry these. See a case in 8 T. R. 192 also in Marshal 389. [Where the Judge read the case & concluded by saying] now will observe that the vessel was not condemned because she had not a roll & equipage, but they could not be on the ground of her being enemy's property, & the reasons were that she had not a roll & equipage, & those reasons were open for investigation. So that the principle is that any point decided cannot be argued into it must be taken as true, however false it may be; but no facts leading to, or tending to be the reasons of that decision, is conclusive. it may be argued into. Thus we must then that in the above case, her having no roll & equipage was not the point decided. it was the reason of the decision, that she was enemy's property.

Lex. Mercatoria.

Of Deviation: Sect. 11th April 3rd 1813.

There is also an implied Warranty by the insured that the Ship shall not deviate, i.e. out of her course, under any circumstances. If she does the Insurers are discharged. It is not on the ground that there is a greater risk. We cannot always tell that the loss was owing to the deviation, but it is the implied contract that she shall not deviate. There is a contract entered into, on which the insurers cannot be subjected if the insured does not perform his part. To be sure it is not like a Warranty, a condition precedent, & thus voids the Policy ab initio.

Suppose the Ship does not go the nearest possible course, is that a deviation? If she goes the usual course, whether that is the nearest or most direct course or not, there is no deviation. There is a deviation from the direct straight line: but it is no deviation within the meaning of the term as used in L.M. In such case it is a great Q^u. whether the Cape has a right to take the nearest course, & not be said to deviate, when that course is not the customary one? If it is more matter of experiment, & she is lost by attempting a new course, altho it is nearer than the old, it is a deviation. There is a case where a vessel struck a new course, not for matter of experiment, as the sea was well known, & it was held to be no deviation. This was a voyage from America to the E. Indies. It was the first vessel which attempted to go the route, which is now the usual one, i.e. instead of going the old round round the Cape of Good Hope to go thro the South seas. In the voyage a particular loss

See *Mercator's*.

navigation - it was held to be no deviation ^{see *Ben. 348*}.
that was a correct decision - there are no cases on the
subject. This case was from Delaware on the *Albany*.
I do not know that it has ever been reported. If the
course taken be really a dangerous one, it w^d
be a deviation. The safest way is to follow the usual
course, & when this is done, there is no deviation. And
it is no deviation to go out of the course to touch at
certain places, where those pursuing that voyage usu-
ally stop.

Suppose a coast air plane lies out of the course
& the vessel goes there, & there is evidence of a few instan-
ces where vessels have gone there, when pursuing y^r same
voyage, & nothing said about it (as being wrong). will this
warrant the deviation? No. it must be the common usual
practice, tho' there may have been some instances where ves-
sels have not touched there. See also *2 Ben. 581*.

The effect of the deviation is not to discharge the
insurers entirely, i.e. not to vitiate y^r policy, but to dis-
charge them from all loss subsequent to the deviation.
He is liable for all prior losses. It is not in the nature
of a condition precedent like a warranty. *35 Reg. 340, 351 & 446*.

It has been contended that when a vessel has de-
viated, if she returns herself again to the same course
without any accident happening, being on your flight, &
pursues her voyage the insurers are not discharged.
This was formerly contended in *Engl.* But y^d I think it is now
settled on this subject. Such deviation is fatal, no matter
how small it is, if done on purpose. This has been

Lex Causae

this decided in the *Insurance* - The Insurers are liable for the subsequent loss. *Bowen L. 315*. for 2 cases. One of these cases is a strong one. It was an insurance on a vessel from A. to B. and they touched at C. but immediately came out again & pursued the voyage. It was not usual to touch at C. and this was therefore a fatal deviation - the insurers were discharged.

The policy says, & often does provide for touching at a certain port; but if it does not thus provide, & the port is one which is not usually stopped at, the insurers are discharged. This was strongly contended. The judge decided in favour of the insurers, & to put an end to it, it was in the dernier resort determined in the House of Lords, agreeably to the decision of the judges. *12 M. & W. 444*.

I suppose there are several points of discharge - you have got to go to all of them. Now in what way must you go to them? You must go to them in their order. It is a deviation. If the order is pointed out in the policy, that must be strictly pursued, tho it is not the natural geographical order. If not it is a deviation & the insurers are discharged. *6 T. R. 581*. The claim in this case was, that there had been a deviation. The point which was mentioned last in the policy was the first in geographical order. The court held at it first, it was held to be a deviation & the insurers discharged. And yet the Capt. had a message to land at this port first - for this port the last in the order of the policy was a good & safe one. & the one mentioned first in order in the policy was a very difficult one & the Capt. wished

Sex. Mercatoris.

to insist at the safe Port first. But the Law is, we must pursue the Policy.

Suppose this is not provided for in the policy - a vessel was insured to go into the Mediterranean and the Ports of discharge were Marseilles, Tarragona & Leghorn. The natural order is as I have mentioned them. In case of pursuing that order the sailor, past Marseilles, went on to Tarragona first, from thence to Leghorn, & then set out for Marseilles & on going there she was lost. The Law was, were the Insurers discharged? The Court said down the rule, that they must go to the Ports of discharge in their natural order, if the order is not pointed out in the Policy - If it is, they must pursue the order thus pointed out. Of course in the above case the Insurers were discharged. 8 W. 533.

But I find much fault with this decision on an other ground. It appears by reading the facts that they were unable to get into Marseilles owing to contrary winds; & it being favorable to carry her to Tarragona she continued her voyage there at Leghorn. I think then the deviation in this case ought to be excused on the ground of necessity - which will always excuse as you may see in 1550 & 1551. The necessity in that case was not greater than in this. The principle however was a correct one.

Another point necessary to be noticed - The insured vessel is made with liberty to touch & stay at any place & that generally where guarantee is made. Suppose she is insured from New York to Charleston - with liberty to touch at any place in U.S. Now has she a right to go to

Lex Mercatoria.

Boston. (29). The 4th case decides that this is not y.^e construction. The meaning is you may touch at any port on the voyage. By touching is meant stopping at any place, after you have set out on your course. but under this liberty to touch you have no right to go the contrary way. The rule as above is proper, for otherwise it would be contrary to the intention of the parties. *Doug. Savane vs Wilson*. & *Doug. Savane vs Watson*.

Letters of Marque are often insured. What are the privileges of a Letter of Marque? Unless it is expressly provided for, they have no right to cruise. Their persons are merely for defense (for in this they are entirely different from Privateers). When insured they have no right to deviate in quest of prizes. they have a right to defend themselves & if they come across an enemy on their course, they have a right to chase him, & pursue him out of the course in order to capture him. They sh^d. return to their course as soon as possible. but if they sh^d. never return the insurers w^l. be liable. But they have no right to go out of their course to find an enemy; but having found him on their course they may chase him ever so far. *15 S. 2. 16*.

In y.^e above case in *Bours*, or in some other on the same Book. the Letter of Marque found an enemy in her course, & chased him out of it, & that night lost sight of him, & the next morning were cruising. & as it was holden to be a deviation & the insurers discharged.

The many precedents in the *Solius* for a right to cruise (which she frequently does for a limited time) & when this is the case she has a right to cruise for that time.

Lex Mercatoria.

but it must be for that time successively - as in the case of *Scitia* before where liberty was given to a letter of attorney to receive *bricks* - it was not to be used to successively *bricks* -

There are such things as trading voyages to continue for a certain time or seasons. As the trading voyages to Africa were of this kind. Now when a vessel was insured to go there, & did not deviate on her voyage, but stayed on the coast a number of months in time, & was finally lost, the insurers were discharged. Page 313.

You must always keep in mind that y^e deviation is not life fatal, because there is in our view, no greater risk. We cannot tell whether a loss ^{or} has happened or not if the vessel has not deviated. But it is a contract & it must be complied with.

As to the deviation when they come to the dividing point I have had occasion to speak before, but I will again notice it here - there appears to be a contradiction between the first & last cases on this subject, but there is none in principle. Now it is a rule that an intention to deviate, is no deviation, if a loss happens before the ship arrives at the dividing point this intention will not discharge the insurers. But if a loss happens after she has arrived at the dividing point & she has deviated the insurers are discharged. e.g. Suppose a vessel sets out from this country for Italy. The insurers agree with her to London, & she has an intention to deviate to Rome. Now the course to Rome is the same journey

Sea Mercatoria.

distance, as to London. if a loss happens before she arrives at the dividing point, the insurers are liable. but if a loss happens after she deviates from the course to London they are discharged. But in case no such voyage was intended as that for which she was insured, the insurers are liable for no loss whether it happens before or after her arrival at the dividing point. As e.g. Suppose she was insured for London, but the cargo was not adapted for goods but for a China market. Then the insurer is discharged from a loss which happens before she arrives at the dividing point, for it is evident she never intended to go to London. In the other case the Ship did intend to go to London, but she wished to deviate & go by Cork. If you keep this destination in mind you will understand all the cases. See also all of the author's but 2 Feb 1247. when I laid down the principle before. see page

I have already noticed that a deviation originating from necessity never discharges the insurers, as if the Capt. this good motive deviates to avoid danger. The principle in such case is, the Capt. has done his best to pursue the voyage, & had no intention to deviate, but has been driven out of the course. So short of weather is sufficient reason for a deviation, & having been driven out of the course, she may pursue her own course from the point where she is, & the insurers are not discharged. 1st R. 25.

For want of necessary repairs discovered at Sea the Capt. has a right to return to the first & nearest port, & if it is out of her course, & the insurers are not discharged. This was a case. This time a vessel was bound from Port to port

Lex Mercatoria.

in the C. Brown to London, & after she got to Gen, it was found she wanted repairs & the Capt. took her to Genoa & this was a great distance. But the fact was not as the Court then was this was the only port she could get to, & the Insurers were not discharged. 1. Alk 545.

I have already observed that a ship may go out of her course to join a regular convoy. She may go out of her course to avoid an enemy. All these are cases of necessity. 2. Alk 443. Comp 506.

Cases of Abandonment have occurred some difficulty. Suppose the crew meeting to compel the Capt. to go out of his course, is it a deviation? There is a case of this kind where the point is settled in Eng. but I shrink from looking into the different writers, that it is not the Rule. It is not the universal rule of nations. The case was this - the ship was a letter of attorney insured from Bristol to Newfoundland - she took a prize & the crew wanting the money metlined, who had previously sent in her prize to the Capt. wished to continue the voyage but the crew forced her to turn back, & in returning he was captured & the crew was killed & the business was discharged. The Court decided this a deviation & the necessity. But this decision can be applied to some cases. 2. Alk 266. perhaps 2. Dm. 1286.

Of the losses insured against.

It would merely promise that I should be contented in considering this part of our subject to keep in mind the particular loss we are considering as of the cargo was more is that I need not say. If we are treating of perils of the Sea we should consider

Lex Mercatoria.

that the insurance is limited to a loss by the perils of the Sea only. I have already noted some things as to a total & a partial loss. I now come to explain what is meant by a total & by a partial loss - the latter has been sufficiently considered.

A total loss means something different in common parlance, from what it does in L. M. There may be a total loss at the L. M. tho' all is not lost. If the loss is so great as to frustrate the voyage, it is a total loss. Suppose e.g. the ship is cast away, & what is saved does not amount to as much as the value of the freight the insured can recover for a total loss. But in doing this he must abandon to the insurers all that can be saved, under this way the property saved being sometimes of more value than was expected, the insurers make a good bargain.

There is a time in which the insured have a right to abandon all the property insured to the insurers & then claim of him for a total loss. e.g. Suppose y^e insured hears the vessel is captured he has a right to abandon to the insurers for a total loss. & if he should, in one hour afterwards, that the vessel had been recaptured, & made a capital voyage, it is nothing to him. The whole property belongs to the insurers.

I knew a case on the time of the American Revolution - A Privateer which went out from N. Y. was insured, they heard that she had been captured, & she was abandoned. But before her capture she had taken a valuable prize which arrived safe. This was incident to belong to the insurers.

Sec. Mercatoria.

Of Perils of the Sea. If the insurance is made as perils of the sea only, the insurers are not liable for a loss happening in any other way. What are, perils of the sea? All danger from waves, waves, winds, storms, rocks, sandbanks &c. these are perils of the sea. And yet these may in some cases be the same ground of the loss, and yet the loss be attributed to a different cause than that of perils of the sea. If there is another cause in conjunction, as e.g. that the vessel was not seaworthy & that is a loss, it is not by perils of the sea. So in a case I mentioned above where the insurance was as the perils of the sea only, & by stress of weather the ship was driven on the coast of France & there captured. This was not a loss occasioned by the perils of the sea. The immediate cause of the loss was the capture. The remote cause was stress of weather, & the both combined to produce the loss. The latter is entirely out of the sea, & not regarded.

There has been some difficulty arising from cases where two causes have combined to produce a loss. as if property is thrown on board to save the ship, the loss is always then considered a loss by the perils of the sea. But suppose that by contrary winds & a great length of bad weather the ship is delayed on her voyage till many of their cattle (e.g. wheat they had on board) become diseased, as by being kept on half allowance &c. is this a loss by perils of the sea? No. The law has determined that if their salvation depended upon their throwing property on board, the loss is a loss by the perils of the sea. The same case if a ship

Sec. Mercatoria.

which was entirely ruined & lost her owners. The Court held this not a loss by perils of the Sea. 1 Esp 16. 444.

There is a case of this kind. A vessel had gone to Sea & her rigging was e.g. her anchors were lost, which were insured against. & now it is clear that the owners are not to pay for the damage done to the rigging. But suppose she is obliged to put her cable in a storm - & these (i.e. her anchors) are insured. & now, whether it is an ordinary or extraordinary case, is nice. Qu. & requires a more accurate judge to determine than most cases of the Law. If it is extraordinary, it is considered perils of the Sea.

Insurance vs Perils & also Running foul of another Ship.

All that is to be said on this subject is, that of no ordinary human prudence would guard us running foul, the insurers are liable. But if it happens by the misconduct of the Master or mariners, the insurers are not liable for this is not insured vs. The claim is then vs the owner or the captain or the Ship. So as by running foul of another Ship most usually happens in the night.

Insurance vs Loss by Fire.

The same rule obtains here, as in case of loss by running foul. If the loss happens by the misconduct of the Master or mariners the insurers are not liable. There are two cases which I will mention. A Dutch Ship coming up the River wished to touch at

Spanish Island. The people were much alarmed by it and the plague was on board of the Ship. They gathered together & burned her. The insurers were held liable.

See the case.

The other case arose from the same cause. The people on the boat were all a mile far from the land the plague on board as the ship were deadly. They arose on board to burn her. But the Capt. advised them that the sick help on board was owing entirely to bad provisions, & that it was not the plague. This quieted the mob & they suffered her to remain on board. But in fact they had the plague on board, & it soon spread among the inhabitants - a mob again assembled & burned the ship. In this case the insurers were held not liable. This is not Eng^l case. See Emery on.

See 12th April 5th 1813.

Loss by Capture. There is a distinction to be observed between Capture & Detention. The Policy in general provides for detention, which is a detention by Kings, Princes, & People. A vessel may be detained & not captured. If the object of the seizure is to take a prize, it is then a capture. but if the ship is taken up for carrying contraband goods, or for having Enemies goods on board, & carried in for adjudication, that comes under the head of Loss insurance as Loss by detention. No matter whether the detention is lawful or not, the insurers are liable, it is within the words of the Policy.

In case of Capture of the vessel is not warranted neutral, it makes no difference whether she is or not, if captured the insurers are liable. But if she is warranted neutral & is not captured the insurers are not liable.

Capture sometimes means a total & sometimes

Lex Mercatoria.

a partial loss. The insured in case of capture may always abandon as for a total loss, & the insurers are liable for the whole. But then, if the vessel is released, the property is all theirs. Sometimes the vessel is recaptured before they abandon, & then it may be either a total or a partial loss. If she is recaptured under such circumstances that she continues her original voyage, it is only a partial loss, & the insured cannot abandon. If she is taken out of her course, so that her voyage is frustrated, it is a total loss & the recaptured vessel has a right to abandon. So likewise if she is taken to a port for a certain sum, which the Capt. pays, & the voyage is impeded, it is a partial loss to the amount of the ransom paid & the insured is liable to that amt. but it is not a total loss. So in all cases where there is a partial loss by capture, whether made by an intelligent or by a neutral, the insurer is liable for the whole voyage. it is only a partial loss you will observe, i.e. if a vessel is captured.)

Capture of goods is a total loss - if nothing is recovered. You may abandon & decline as for a total loss. It does not depend on the condemnation of the goods. But if the insured hears of the capture at the same time that he hears of her recapture, any time before abandonment. Whether he can abandon for a total loss or not depends upon another, which is has the voyage been frustrated? Suppose the vessel has been captured & is soon immediately after & proceeds her voyage & the insured hears of this before abandonment. it is only a partial loss.

Sea Mercatoria.

the vessel abandon. he will recover the money paid
the insurer. If he hears of the capture first & does
not abandon till he hears of the recapture, if there
is a total loss only he cannot abandon. You
will remember that no property vests in the recapture
till she is carried in & condemned. 3 Bur 645. 10th ed. 1797. till
this is done the property is in the first captor.

The right of abandonment is a liberty given to
the insured he can never be compelled to abandon. He
has been sometimes misled by the insurers that they do
compel the insured to abandon for fear that the Court
& Seamen will not take as much care as they ought,
& then the insurers may take upon themselves to care as
much as possible for the vessel. 1 Bl. R. 113. The insurer
is liable for such sums as are bona fide paid in
towards a compromise. Suppose there is a total loss
after the vessel has been captured. the insurer is lia-
ble for both. In this way you see it is that he is obliged
to pay for more than a total loss. you will find no
such cases & this is one of them.

There never has been any, 2u. 10th Edition
Bills till lately. they were formerly considered as
Contracts & a recovery allowed upon them. But now
in Eng. no recovery can be had upon them when the
vessel is lost. This is a provision made by Statute Act
without the Stat. I conceive no recovery can be had
upon them in any other Court. while the
vessel is lost, according to the principles of 2u. 10th Edition 1376.

Another loss which may be insured against
is

L. A. Mercator

is. Detention. The expression is "Detention by Kings, Princes, & People of every nation & state". Of course the insured is liable for losses occasioned by the detention of the ship by the authority of another nation. No enquiry is ever made whether the detention was legal or illegal. Detentions are frequent by Embargoes. Ships are detained to prevent the circulation of certain intelligence. or the government sometimes detain them for public service, as to take the ship as a transport. These arbitrary acts of government are all detentions. Against these the insurance is made under the head of "Detention", of course the Insurers are liable. So if a Ship being neutral, is taken ^{at sea} with enemy's property on board the Ship cannot be condemned, but she may be detained till the goods are taken from her, & she may be sent into port to unload the goods. This is a detention & for it the Insurers are liable. When two nations declare war to each other, & at the time there are Ships of the one in the ports of the other, & they are for shipment, or going out. this is capture & not detention. the object is prize. But whenever the object is not prize it is detention. A case in America (not reported) in March 1800. The Island of Comore belonged to a Venetian republic. it was in a state of famine. the Venetians seized upon a large Genoese vessel & sent her into the port without right to relieve the inhabitants. they however paid for the loss. The insurance was against capture or detention I do not recollect which; but the question was whether this was a capture or detention.

Lex Mercatoria.

she was insured as only one. The Ct of Sincere determined
altho it was their own ship that it was detention
for the object was not, prize. Thus we get at the prin-
ciple. If the object is prize it is capture; if not, it is
detention.

If a Ship is navigated contrary to the Laws of Na-
tious, or is arrested for non payment of duties & is de-
tained, for this the Insurer is not liable. he does not
insure vs such misconduct. and there is an im-
plication that the ship will be navigated according to
Law, & that the insured will pay duties &c. The insu-
rer may make himself liable in such case, if he in-
sures vs the fidelity of the Capt. which is often done
though as it may appear. But this is a distinct con-
sideration, & under the head of detention we have nothing
to do with it. 2 Ser. 176.

The insurance is vs detention by "Kings Princes
& People" any detention by these whether made legally
or illegally, rightfully or wrongfully, will subject the
Insurer. There has been a Qu. as to what is meant by
the word People. I will mention a case which brot
up the Qu. A vessel loaded with Corn left Eng. &c
was driven by stress of weather onto Ireland. and
the people appointed a Committee to pay the Capt
a generous price for the Corn, & then took it by force.
This was not done by the authority of King or Prince.
The Qu. was whether this was a detention by "People"
within the meaning of the insurance? The Ct. determined
that the words Kings Princes & People meant the

Sec. Mercatoria.

Relating Powers of any Government, whether monarchical or Republican. The Insurers are not liable if it was a detention by a Mob & not by "People" within the meaning of the expression. If the detention is by order of Government, the Insurer is always liable whether lawful or not, except in case the Master is to blame.

2 D. Ray 7040. 1 Bul 444.

Q. may the Insured abandon in case of detention? It depends upon this. if the detention is so long that it defeats or frustrates the voyage they may abandon for a total loss. & this is to be determined by the Court. But if it is a detention only for a few days, & the voyage is not frustrated, the insurers cannot abandon, but will recover for a partial loss. 2 Bar. 583.

There is always a clause in all Treaties of Peace, that all captures made after the date of the Treaty shall be restored to the owners. Now in such case if captures are made, & the vessels are restored to the owners, it is considered a detention, & not a capture & the Insurers are liable for a detention. 12 Term 1217.

Of Insurance, & Barratry. with respect to this the Law appears to have been continually changing from the first cases to the last. On this account the Law does not appear to be so well settled on this, as on many other branches of insurance. I will state what is subject to you.

By Barratry is meant, an insurance by the insured to the insurer or the misconduct of those persons employed by the insured. Thus Captains & Mariners

Let. Mercatoria

It is an insurance, as that every thing, for which you
insure the ship or the insured will be liable to those per-
sons who are injured. The reason of this was that y^r. own-
ers put the goods on board, & when they went to insure
the ship, they asked the insurer if he would also insure
as the owner of the cargo, for he was a stranger to them.
Formerly the particular Capt. was to be named on the in-
surance, but you recollect, the insurance is now made
in this way "I. Capt. or any other person who may have
to go." The great difficulty is to ascertain what narra-
tive is? The definition, to be gathered from the old ins. does
not convey the idea exactly. I will state it to you. Ac-
cording to them it implies some kind of misconduct or
paid committee as the owner. Some cases are plain, as
running away with the ship, abandoning her, embor-
zing, turning thieves - &c. See 281, 282 Reg. 1844, 1845. 320.

The owner of the goods then has no objection to insure
as the Narrative of the Capt. for he may have his re-
edy, as the insured. But the owner of the ship may in-
sure as the Narrative of his own Agent, or Capt. or
Capt. may insure as the Narrative of the Stevedores.

The first cases go on the ground that no negli-
gence or mistake perhaps is, Narrative, although the owner
of the ship is to be liable to the owner of the goods if
Capt. happening in consequence of these. But it is not
Narrative because this implies something except an
error. you may see a case in 1845. 325.

When the insurance is as the Narrative of the
Capt. & the stevedores in the manner when it goes

Sex. Mercatoria.

Capt. to turn back is not Barratry, as in the example before given of the Letter of Attorney. The Ct. held it was a matter of necessity. There was no wrong intention on the Capt's & this there must be to constitute Barratry. It is however Barratry in the Mercantile, of that. has been decided against. 2 Bar 1264 perhaps 2 Bar 1269.

Another Case. A Letter of Attorney went out of her course to Cruise, which you will recollect she has no right to do - and got lost. Was it Barratry? It was not, no doubt. It was urged that there was no wrong intention, no corrupt design, nor any fraud. The Ct. determined that it was Barratry on this ground: that there was a breach of trust, and where there was a breach of trust, tho' no wrong intention it was Barratry. 3 T. R. 379. According to the circumstances of this case, we are not at liberty to perceive that she went out of her course for the purpose of injuring the owners. Mark the difference therefore between this case & former cases. In the former ones they held that there must be some wilful misconduct or fraud committed by the owners to constitute Barratry. In this they say a breach of trust, without any wilful misconduct is Barratry.

There was likewise in that same case a 3 T. R. Sup. this circumstance which I have before mentioned for another purpose. This L. of Attorney met with an American ship & plundered her. The owner of the Letter was made liable to the American for the plunder. This was another ground on which it was determined

See *McCall v. The Ship*.

In *Barrett v. The Ship*, the Court had no intention of injuring the insurers, but he had subjected them by a wrong act. It was a breach of trust. If the owners of the ship had directed the wrong act to be performed, it w^d not have been barratry - it w^d then have been the same as if the owner had done it himself. But the owner of the ship can not commit barratry for he has a right to act as he pleases with his own. 2 L. R. 1173, 15 M. 323.

If the ship is chartered from a 3^d person, and the person from whom she is chartered directs a wrong act to be done, it is barratry & the insurers w^d be liable. The freighter in that case is the owner for the time being. Comp 143, 4 M. 33.

This Qu. has arisen. The ship was lost by the smuggling of the Capt. Surely this was barratry. It was a breach of trust of the owners did not direct it. The Capt. had no intention, however, of injury to the owners. But the policy was expressly limited to "lawful trade only" - now says the Insurer I am not liable according to the terms of the policy which is on lawful trade only. But the Ct held him liable for this barratry. They can understand thus. They considered it as two distinct things. viz. an insurance vs barratry, & an insurance on a lawful trade. Suppos. the insurers had insured vs barratry only, they would be liable under that title. This case is not clearly reported. For the Reporters says the Ct was here liable because the insurance on lawful trade, meant the owner or charterer should not do what - This is not correct on grounds of that decision is sound? 3 M. 223.

Sex. Mercatoria.

Another case of Barratry. The insurance was for a limited time say 12 m^{os}. or she is insured till she arrives in Port. The Master commits Barratry. The Ship arrives & is safely anchored & moored 24 hours & then the time expires. & after this she is seized for smuggling which is Barratry. Now are the insurers liable. The rule is, that the loss must happen within the time mentioned. If the loss does not happen till after the expiration of the time the insurers are discharged, tho the cause of the loss may have happened before. In this case, she got into port before the time, and after that the fraud was found out. The rule as above is universal. 18. C. 252.

With respect to Barratry it appears to me by the cases, that any conduct which is mischievous to the owners, & which arises from any act which implies in it a breach of trust tho no injury is made to the owners, is Barratry. Thus if it does not imply a breach of trust. If you can presume that the owners would have advised the thing to be done, tho they were present, tho it afterwards turns out to be a loss to the owners, yet it is not in my opinion Barratry. A case in Conn. A vessel went out warranted Neutral & on the trial it was agreed she was neutral. She was taken by an Eng^t. Privateer, on the ground the property on board belonged to the Enemy. The Captⁿ ordered her for Gibraltar for adjudication. The Captⁿ & hands was released but, now the Captⁿ asks what you will allow is the same as resisting the right of search.

Lex Mercatoria.

that she was again captured & carried into Eng^d. I am
satisfied, not because she was enemy's property, for the
Ct. s^d. it was neutral, but because of her resisting.
Her action was not as the insurers for Barratry
in the Capt. in doing the act which caused the condem-
nation. Were the Insurers liable for Barratry? etc
(adding) to the old idea it w^d. not be Barratry, for no
one can suppose the Capt. meant to commit an act
to the prejudice of the owners, & this is fully so. But
the Ct. held it was Barratry & the Insurers liable, on
the ground that it was Barratry in the Capt. to retain
the vessel. But I disagreed (it was y^e only dissentient).
I conceive there was no wrongful conduct. no breach
of trust. an act ~~and~~ which the owners w^d. have done had
they been present. Such acts are always applauded
on this ground I conceived there was no Barratry. This
is not another case of y^e kind to be found I believe. You
may see this case in 4 Day, 27^e Judges opin^g at length.
There is a case of this kind. A vessel went to the Coast
of Africa, & continued on the Coast trading. She had
on board considerable goods the Capt. knew that a French
force was on the Coast, but his trade being very lu-
crative he remained there for a long time. He had
no intention of injuring the ~~Capt.~~ ^{country} but was finally
captured. and the Ct. decided that it was Barratry. but
the ground of the decision was "that the owners would
not have advised him to continue there, when there was
such danger of being captured. But in the Cons^l case. Sup-
posed ask of the owner his own on board, and the

Lex. Mercatoria.

Capt. had asked them, "Shall I strike this prize master under the hatch?" would they not have directed him to do it? It was a meritorious act, & one which is always applauded by the owners. & it is fair to presume they would have directed it. It was to be sure a breach of the Law of Nations & therefore ^{was} ~~correctly~~ condemned. There is only this difficulty in it - it is said that you cannot presume that the owner ^{w.} has directed an act to be done which is unlawful. But this is contrary to the usual practice for we know the owners always sanction an act of this kind.

Of Insurance vs the Ship by General Average.

This is a loss insured against. When a loss is sustained by the insured for the purpose of saving the Ship & Cargo remaining, as if a part is not remaining thrown overboard all will be lost. - Now this is a loss by General Average & the principle is this, was the loss sustained for the purpose of saving the Ship & Cargo? If so, it is a general average, & the insurers are liable to those who pay. So if one man has 1000⁰⁰ worth on board, & another a like sum, & the property of one is thrown over to save the rest, the person whose property was saved must pay the other his proportion of the loss. as among themselves they adjust the loss & then the insurers are liable to those who have paid. So of y. masts, rigging &c. are cut away, & it is the same. So if it is a composition with pirates, as they say, if you will give us certain property, (which belongs to S. S.) we will leave you the ship, & it is accordingly done. - now the rest must pay S. S. according to their proportion on board. - So if the ship is run down, each one pays his proportionate part

Six. Mercatoria.

Then he may recover it of the Insurer. So if they defend themselves vs an enemy, any expense in doing it, as if some are wounded & are under the care of a Doctor, the insurer is liable for all that expense under the head of General Average - because it is incurred in endeavoring to liberate themselves from an unjust capture. If loss is proportioned among all the owners of the Ship & goods, & the Insurer is then liable to each according to the proportion paid. This is the Law & has never been contradicted, 12 Co. 63. 13. E. 116. 148.

There are certain things not insured against as paying, & losing money, cutting out of the Ship &c. It is said that the throwing overboard must be by consultation of the Officers. But there is no reason for this in all cases - It must be done by order of the Master. Now you will remember the principle is that the loss must contribute to the safety of the Ship & cargo if it is not for this purpose it is not an Average loss. Suppose a Pirate comes near to the vessel, & does not wish to take the whole, but takes the provisions &c. &c. this is not a general average loss, which all those on board are to appertain among themselves according to their interest. Or suppose the vessel springs a Leak, & a person on board has 100 lbs of sugar damaged, but nothing is thrown overboard - here no average is to be made. Moor 297.

Suppose to avoid an enemy a part of the cargo is landed, which is said, but the vessel & the remaining part of her cargo is captured. Now shall the

Lex Mercatoria.

Goods landed contribute to pay the loss? Ask the Du. did the saving of the goods landed contribute to the loss? This is the Du. & on this point the decision is to be made. The taking the rest of the property on board did not contribute to save those on shore - there is to be no contribution then. So if goods are thrown overboard to save the vessel, but she is finally lost in the storm; or is driven on shore by the storm & part of the goods are saved, the goods which went down in the first case, or those which were saved in the last shall not contribute to pay the loss of those thrown overboard or lost. Here you may draw your determination again by asking the Du. was the throwing these overboard the means of saving the rest? Certainly not - for all were afterwards lost. But if the Ship is saved by the jelsam, then it is a loss by general Average, & the insurers are liable. And if the Ship is saved on that Storm by the jelsam & afterwards lost in another Storm, still there must be an average - for the principle is the same - it contributed to save the Ship.

Suppos. the Ship is on a Bar & w. perich, but some goods are taken out & put on board of lighters, & after lightening the Ship, she gets off the bar, & arrives safe, but all the goods on board of the lighters are lost. Now there must be a general average. But suppos. the goods in the lighters arrive safe & the Ship is lost on the Bar. now the goods in the lighters shall not contribute to the loss. These being saved did not contribute to the loss of the Ship.

Lex. Mercatorum.

Sept. 13th. 1715.

Among other things called general average for which the Insurers are liable, altho the loss is on articles which it is not otherwise to leave, as when a neutral vessel is taken & carried into port of a belligerent, & it turns out that she was unjustly taken, she recovers no cost for the unjust detention - but the cost, expense & all charges during her detention &c. is this thing called general average, & for it the Insurers are liable. You may remember that by the mem. attached to the Policy, the Insurers are not liable for a partial loss on perishable articles. For certain other articles, he is not liable for a partial loss unless it amounts to 5 p^{cent}. In all this he is not liable for a partial loss unless it exceeds 3 p^{cent} - but still in these cases the Insurers are liable for loss by general average, tho it be ever so small. And so if a Ship is forced into a Port to repair & the Crew is at exp^{ense} laying there, it is a loss by general average & the Insurers are liable. B.D. 11. 150. 2. 11. 407.

More Sea Damage as such, which is not occasioned by saving the vessel or Cargo, is always to the loss of the particular owner - as if the vessel springs a Leak & nothing is thrown overboard, but it has 1000⁰⁰ of Sturgeon on board, & a quantity of Hair, &c. is injured. The Shipowner must bear the loss - no average is to be paid by the others. Of course if the vessel is entirely upon, he is not liable, but in certain actions

Six. *Maritima*.

where the loss exceeds 3 parts in others he is not liable
unless it exceeds 3 parts. & in others he is not liable.
the thing is a total loss. And remember that altho the
goods are thrown overboard to save the Ship & Cargo,
yet if it does not accomplish it, there is to be no general
average as in the example before of goods being
put on boards of lighters for the purpose of saving the
Ship but the Ship was lost. there was no general average
but seems if it has the desired effect. See 1 East 220.

There must be some rule about these damages.
They are to be borne by the whole. The Ship bears its part,
the freight its part, & the Cargo its part. The rule of
damages is this - The proportion to be paid by the Ship
is according to her value in the Port of delivery. So
also of the freight or Cargo, there are to pay according
to their worth at the Port of delivery. The aggregate
sum to be counted upon is what it is all worth at the
Port of delivery. To explain it: can the persons who bear
the same proportion to his property, as the whole. Co's
bears to the aggregate sum, i.e. to the value of Ship
freight & Cargo. Suppose e.g. The Ship freight & Cargo
were worth 320,000, & the property thrown over was worth 85,000
& the property on board was worth 1,000 & it was thrown over.
now how much must he lose. If his property is saved he has
got 2500 to pay - if his property is lost he has 7500 to receive. There
is this to be done. It is most generally settled by the parties themselves
but if any difficulty arises in Ct. of Admiralty adjust it.
where the Admirals are called upon there is no difficulty
for they are virtually liable to pay the whole.

Sec. Mercatoria.

The next sentence is Expense of Salvage.

The word Salvage has in Dutch a double meaning. It means the thing saved & also the expense incurred. There seems to be great barrenness in it with regard to terms. This is apt to confound us. The thing insured is the expense. There is some rule about this. The insurers have to pay the expense in saving a ship or vessel that has been captured & recaptured; there is salvage to be paid, for the recaptors are entitled to a certain portion of the capture, & this must be paid by the insurer. I mean a recapture, before condemnation; for if the recapture is after condemnation, the recaptors are entitled to the whole.

The difficulty is what are the recaptors entitled to? I have taken much pains to find out what the rule of L. M. is on this subject. The reason why I have been anxious to find out is, that we have no Statute or Law on the subject. In Eng. & in every other nation, Statutes, Laws & Ordinances are made, regulating the amount that recaptors are to have. The first Statute in Eng. was in the Reign of Anne. But this is not the L. M. it is a reservation in Statute & of course not binding on us here. Some of the Faculty do not agree that I go to a Statute & Admiralty. Both L. M. & the Admiralty had a line on the property & were not obliged to give it up till they were paid their proportion, which was to be a reasonable salvage. In case they disagreed they so leave it with the Admiralty. This may be seen here, but it is

Lex Mercatoria.

is desirable to have an uniform rule. So far we know the Parties may agree and what they agree upon the Insurers will have to pay. 1 S. Rep. 343.

Suppose the reinsureds demand one half for the recapture, & refuse to deliver up the Ship & Cargo. This is unreasonable what is to be done? The answer will sooner than you would think you will give it. How can he recover this of the Insurers? The answer is. Not. Can he recover this if they were certain the Insurers would be liable over to them for as much. But this can not be. He cannot recover it. It is an unreasonable demand. This shows how much need we have for a certain definitive rule. 2 Salk 654. Hardw. Cat. 304.

We never shall be able to ascertain what the rule of the old L. M. was, unless we can find some very ancient writer. The different nations were ignorant of the L. M. in this particular, & therefore still the subject so far as respects themselves by Stat. &c. The Eng. Stat. lays down a very good rule. in case of recapture is by one of the King's Ships, they receive 1/8 part of the true value - if by a Privateer or other Ship 1/10th part. But this is no part of L. M. I now come to treat of what I have so frequently mentioned viz.

The Right of Abandonment.

That the insured has this right is certain & that the loss is considered total. I have before observed that the word "total" does not signify the same in different common parlance. Whenever there is a risk to be done, it is, in L. M. considered a total loss has been sustained.

Sec. *Abandonment.*

When the case is, then, "When the voyage is frustrated - namely, the ship is captured, & carried out of her course into port for condemnation - although she is acquitted not owing to her long detention the voyage is lost - the season has passed. So if she is stranded, in either of these cases the insured may abandon. You must keep in mind that the voyage must be lost. If she is detained by a foreign Envoys, it is *q. case*.

III^d. The voyage is not lost, but so much property was lost (as e.g. by stranding) that it is *prope* it may be a total loss. The voyage is not entirely frustrated, yet the damage is so great that the amount saved is less than the freight - & you will recollect if the property saved is of less value than the freight, it is a total loss.

Suppose there is no freight, e.g. passengers usually go out in ballast & do not pay freight, now how are you to ascertain whether the loss is total or not - The criterion of comparing with *q. freight* is here wanting for there is no freight. The only rule is this - if the salvage is "very high" the insured has a right to abandon. Now very high is indefinite term. The parties must agree upon what is very high - & if they cannot, the Court must determine. There is no certain rule about it.

IVth. Another ground of abandonment is where the vessel has been obliged to put into port to repair, & the expenses or repairs will be very great, & the insured have notice of it, which notice must be given by

Lex Mercatoria.

the insured to the Insurers. & he tells them that he is insured will not bear this loss. & if the insurers will not agree to pay it, & you will remark that their agreeing to pay is the same as paying, for they are bound by it. the insured may abandon. but if the insurers agree to pay, the insured cannot abandon. If they agree to pay, & the vessel is afterwards lost, the insurers will be compelled to pay for the loss, & also for the expense in repairs &c. The case of Capture I have noticed. it is considered as a total loss, there being nothing else in the case, & the insured may abandon. But if they do not abandon till she is restored, as e.g. ransomed or recaptured they cannot abandon unless the voyage is frustrated. But the insured having heard of the capture, it does not lie in the mouth of the insurer to say, wait till we see whether she is not recaptured. 2 Burr 690. 693.

In one of the Cases in Burr you may see an excellent opinion of Lord Mansfield. You may also see 1 T.R. 309. There you will find the rule established that if there is only a temporary hindrance of the vessel, the loss is only partial. See a case in 3 Atk 105.

On the same principle if there is a detention by "Kings Princes or People" which frustrates the voyage the insured may abandon. & even if it does not frustrate the voyage. 2 Burr 1108. This case contains much Law on the subject. It is a case where the insured did not abandon.

The maxims Law on this subject is that.

See the recollection.

The Capt. is the Agent of the insured. he manages for them. But after abandonment he is as much the agent of the insurers as he was of the insured before abandonment. The Law makes him a part. & his acts are as binding on the insurers as they were on the insured. e.g. his vessel becomes injured & he cannot proceed nor send the Goods to the Port of destination. - he is vested with power to sell the vessel & goods. he has this power ex officio. It is the best thing he can do for the insured. So likewise after abandonment he may do the same thing as Agent for the Insurers. & they are bound by his acts as much as if they had originally employed him.

[Here he read the Case above in 4 Burr 1108. which is also in 1 W.C. 276. from Marshall 491.] The two cases in Burr. ~~very~~ Page 683 & 1148. contain all the Law on the subject that I could ever find any where else.

It is important to understand this right of abandonment, as it frequently arises in insurance offices.

If the Capt. after receipt of the cargo is of opinion that the vessel ^{and cargo} is not worth bringing in. he has discretion any power to sell her. & if he does sell the goods & there is a partial loss the insurers are bound to pay it as so of the loss is total. Douglass v. Miller, 10 B. & C. 237. The case in 20p. was this. The Ship was captured & the Capt. when he sailed, expressed the voyage to be open to the benefit of the owners. & of course if we go on the idea that the property was charged to the insured might at once. But the Ct. said no. it is only a partial loss. you can recover of the insurers the money for a partial loss. it was said for their benefit.

See Mercatoria.

There is also a right of abandonment in case of Shipwreck. the ship is insured. & the cargo is all saved. Is this a total loss? Yes. for the voyage is frustrated. It is not only a total loss of the Ship. but of the cargo too, in the L. M. it now belongs to the Insurer. In such case the Cap^t. has a right to get the property carried in another ship. at his discretion, if he can. and he is to be paid his Freight. but he can get no more for freight than what he himself agreed to carry for.

In all these cases there is a partial loss if the Salvage falls short of the freight, & when it is a partial loss the insured cannot abandon. If the salvage exceeds the freight it is a total loss.

Stranding of the vessel does not of itself make a total loss. it must be such as frustrates the voyage. & then the loss is total. See 17 R. 137 that an abandonment cannot be made when the loss is partial. See Park 169, where the voyage was lost, & it was held to be a total loss of Ship Freight & Cargo, though there was very little loss, except the interruption & delay. see also Park 186 & 2 Stra. 1065.

This abandonment must be made seasonably. By this I expect is meant that the insured cannot lie by & wait the happening of any evil. But on receiving the information which will furnish a cause for aban^d. they must do it immediately or never. 17 R. 608. Park 172. & 5 T. R. 288.

If the insurers in any way prevent the abandonment, when it would have been made, it may be

Dr. H. M. Allen.

that it is a total loss, as if. The insurer came to aban-
don & told the insured that the Ship was stranded, as
situated so much that they were unwilling to be at
the expense of repairs &c. The insurer requested them not
to abandon, & said present the bills & I will pay them.
Now this promise is binding - but on presentation of
the Bills he refused. The Insured said it was a total loss
for the insurer had prevented them from abandoning
when they wished to. 25. 11. 40.

Suppose a vessel has been a long time at sea
& it is presumable she is lost. in such case the insur-
ed may abandon. If she arrives the property is all in
the Insurers. The insured have no claim upon her.

Again suppose after her arrival, in the above case, the
insurers claim a return of the money they have paid
on the abandonment. This they cannot do. The Cases have
settled the doctrine that they cannot. But then what
will you do with those Cases where the Insurers have
recovered back the money they have paid to the insur-
ed, as paid on a Contract without consideration, for
there are Cases where the insured have abandoned
the money been paid them, & afterwards the insurers
allowed to recover it back again. Now how are
we to reconcile these Cases? It is possible they are con-
tradictory - but I apprehend the insurers have re-
covered back the money as supra on those Cases only
where the vessel has arrived, & the insured have themselves
then created her as their own - & in such case the In-
surers ought to be allowed to recover back the money.

Sec. Mercantile.

Suppose the ship is wrecked, & the insurers say take your vessel back and pay back the money. The insured may refuse. Supposing the insurer cannot compel the insured to take it back. But if after having received the money the insured treats the vessel as his own, the insurers may recover back the money. If this is correct, the case is not contradictory, 1807, 18, 42.

There is a case cited by Lord Mansfield in 2 Burr 1005 1006. The case, where a recovery was had after condemnation. But I am of opinion that in this case the insured claimed & treated her as their own.

The abandonment must be entire. If the insurance is general, you cannot abandon or the ship & not or the cargo. But you may abandon or one if there is a distinct insurance, the contract is the same. Policy. So if the insurance is on the cargo, you must abandon or the whole, if the insurance is general. Secus if it is distinct. Suppose there are two distinct Policies on the ship & goods. you may then abandon or the ship & keep the goods. Suppose the insurance is upon these articles "Sugar Cotton & Indigo" & a loss happens upon the sugar, now you cannot abandon or for this & keep the other articles. But if it were on the three articles distinctly & severally, & a loss happens on one, you may abandon as to that & keep the rest. The abandonment vests the property in the insurer. If there are several insurances they are thus made tenants in common. The freight cannot be abandoned. Suppose the cargo was worth

Lex Mercatoria.

\$8,000. and the valued policy is only \$6,000, & you abandon, then you (if insured) recover for \$6,000. & for the remaining 2,000 \$ the insured is tenant in com. with the Insurer.
2 Emery on 215. 237. 197.

There is a case of this kind of consequence was before the war broke out in Spain. the Spanish vessels captured many Eng^t vessels & carried them into the harbours. The Eng^t in return directed captures to be made, & granted letters of reprisal, & by the Law the awards were to be paid to the losers by Spanish Captains. Now to whom was the award to be paid? The insured had abandoned & received the full amount from the Insurers, & therefore they had no right to it. The Court however decreed the money in case of Award to be paid over to the Insurers. & they in turn, paid those whose property had been taken as trustees for the Insurers who were the equitable owners. 1 Vesey 98.

Of the Adjustment of Losses. Sect. 14th of Ins. Act 1813.

If the loss is total & the policy a valued one being bona fide & no wager the method of adjustment in this case has already been noticed. The recovery will be the value. If the policy is an open one, or of value & a partial loss happens, there is to be an enquiry gone into, & the party will recover what he has lost. If the thing lost is capable of a distinct valuation, then the value of the thing lost is to be paid. as e.g. suppose there are 50 H^{ds} of 5 yds & 10 of them are totally ruined. these are capable of a distinct valuation & the loss must be paid for according to their worth. If

Lex Mercatoria.

there is a Partial damage to all the one ^{14th} may be damaged more than another the damages recovered for the partial ^{loss} will be according to the diminution of the whole & this is to be enquired into. It is not capable of a distinct valuation. - Bur 1070.

Now when Goods are partially damaged, when you have found what it is, deduct what they are worth, from the Prime Cost, & the residue is the damage added to the Premium, duties &c. & all expenses &c. It has nothing to do with the value at the Port of delivery. & is Prime Cost. I speak of a total loss of that particular article, but only a partial loss of the cargo, if it is an open policy, or a valued one & there is a partial loss. The rule is, you find out the Prime Cost when put on board & then deduct the damage - as in the example above you find out the prime cost of the Sugar, & then the damage occasioned by the loss of 10 ^{14th} out of 50, & this damage added to the Premium, duties & expenses in repairing it what is to be paid. An enquiry is to be made as to the value of the partial loss. The Ship is valued according to her worth at the time she sailed, including her furniture.

The rule of L. M. as to ascertaining the loss an individual has sustained, is not a very obvious one. In a valued policy the difference between the value of the goods in the policy, & the value in market, is not the rule. e.g. a ^{14th} of Sugar when put on board is worth 30 £ & gets damaged & sells in market for 20 £ now what is the rule of damages? It seems to be

Mr. Montfort.

lost 10£ at least, & perhaps more, for the Market may have been higher. But this is not the rule. It is not 10£. The truth was when they got to market it was glutted & good sugar was worth only 25£ & the damage for only 20£. then it seems the loss would be 5£. But this is not the rule. neither 10£ nor 5£ is y^e damage. The Market has nothing to do with it. The rule is this. The same proportion the loss (now 5£) bears to y^e value of the whole in Market (now 25£) is the rule of damages. will then then the damaged sugar lost 20£ in Market & the good sugar 25£. Now what proportion does 5 (y^e difference between y^e good & bad) bear to 25? why it is one fifth. will then the 1/5th of 30£ is 6£ and 6£ is the damage. the one fifth of what was the value when put on board is the value in that case. It is simple when you understand it. It makes no difference whether you go to a rising or a falling market.

Again. Suppose when he got to Market the good sugar would sell for 50£ and the damage for 40£. now it seems he has lost 10£. what is y^e rule? Enquire what proportion 10£ bears to 50£. It is the one fifth. (now the Insurers say you have lost nothing as you gave but 30£. but y^e rule is as above. Now what was the value when put on board? 30£. then the one fifth of 30 is 6£ the same as above.

Suppose as an example of going to a falling Market. The good sugar would only command 20£ & the damage 10£. Now what is the rule? what proportion does 10 bear to 20? why it is the one half.

See Memorandum.

will be 10 & the damage 1000. The value when put on board was 200 & the damage is just one half of that sum which is 100. & this will be recovered on every day aged 20. 2 Bur 1167.

The losses are commonly adjusted by the Insured & the Insurer without much difficulty. They frequently leave it to the Chambers of Commerce, which are established in all large cities. This is not always the case. For the same frequently is called in aid. & therefore becomes important to ascertain what the Law is, as to adjustment. After the adjustment, it is usual for the Insurer to endorse the sum agreed upon. & this is *Prima facie* evidence that so much is due, & that he is liable for it. Can this endorsement be impeached? No more than any other obligation. A note of hand may be impeached & so may this, in the same way - if there is any misrepresentation of facts or if the Consideration fails. It may be attacked. The usual mode is to bring the Suit on the adjustment (not on the policy) the same as on any other obligation at C.D. which is subscribed. The next Enquiry is - Of Return of Premium.

There are cases where the Premium is to be returned - other cases where it is not - & there are other cases still where the Premium is to be apportioned, i.e. a part of it is to be returned. The principle on which the Insurer is entitled to a Premium is that he runs a risk. Therefore it is a general rule that if he runs no risk he is not entitled to retain the Premium. And this is like any C.D. Contract -

P. 118. A.D. - No. 310.208.

Sec. Mercatoria.

when the consideration fails & the contract out as void. There are some exceptions to the general rule that when no risk has been run the premium is to be returned. I will presently mention them. In all cases of a Policy void ab initio including the idea of fraud or turpitude, the premium can not be retained. We know that a warranty is a condition precedent to the liability, & when the warranty is not complied with, the contract is void ab initio & the premium ought to be returned. And in other cases where there was no warranty, but it turned out that there was no consideration, the premium ought to be returned. Suppose a man in N. York has \$10,000 worth of goods on board, & he gets insured to that amount, to be lost over in a certain time. & it turns out the goods were never put on board. Here then no risk was ever run, the premium sh^d. be returned. But if one half or a certain part of the goods were put on board, then the premium sh^d. be apportioned & part of it paid back.

In case of wagering Policies which are still practiced the no recovery can be had upon the policy. Qu^o. of this kind have arisen "Can the premium be recovered back?" Why should it be? Why measure the law probably thus & therefore the Policy is void ab initio. The insured knows he c^{an}. not recover on the Policy, but he bids the insurers agree that he sh^d. recover well on the insurer recover back the premium? Why sh^d. he? & why because the insured would have no right to his part of the premium & therefore no right to the premium. On this point it is clear

Lex Mercatoria.

that the Insured could not recover back the premium, & so are the decisions. the reason is they are in pari delicto - they sit down & voluntarily break y^e laws of Society - and the Law will not stoop to assist either. The case of recovering back usurious money is very different, for in that case the Law will stoop to assist the oppressed - to protect the weak from the strong & oppressive usurer. But suppose two men sit down to gamble - A. recovers a sum of money out of B. at play. Can B. recover it back? No. will suppose he had not paid the money, but gave his obligation for it, C. A. recover on the obligation? No. The Law disdains to hold out her helping arm to those who voluntarily set her at naught & break over her salutary regulations. Waiving Premium proceeds upon the same ground. *Dang. Lowry v. Bowditch*.

In the case of *Dang. Lowry v. Bowditch*, Justice Butler said (it was agreed to by the Ct.) that there was a material distinction to be observed between executory & executory contracts - that of the contract yet remained executory there C^t. be a recovery. But soon came that this distinction is absurd, & the late authorities overrule it - as e.g. you sue for the Premium before the Ship returns, according to this idea you C^t. recover. It is incorrect. Suppose for example you pay a man for smuggling goods, he has received the money, & you have paid it to him to break the Revenue Laws. Now if you C^t. recover the money back while y^e contract remains executory

Sea Monitory.

i.e. before the smuggling was done, it would afford the greatest temptation for him to hasten in breaking the Laws of his Country, for fear the money might be recovered back. This doctrine has been overruled. See 3rd H. 166 & one or two other decisions in Campbell. Then altho the Contract is executory, yet you cannot recover. If the Contract is to do an illegal thing & you have paid the money, you cannot recover it back, & if you have not paid it, the other party cannot recover it of you.

In a valant Policy, in case of a total loss, there can be no recovery of Premium. There have been insurances to protect a trade, as e.g. with an Enemy, upon the Premium. & not be recovered back, for the Contract was illegal & void ab initio. 1 East 46.

The exception to the general rule that the Premium can be recovered back where no risk is run, is on this principle viz that the Contract is illegal & where it is illegal, the Law will afford no assistance to either party. In all other cases the Premium is to be recovered back in whole or in part if the Consideration fails. As suppose the policy is void for a non compliance with a warranty, when there was no ^{exhausting} payment, the Premium must be returned. So suppose there is paid in the insurance, the premium must be returned as in the example already given where the insured supposes his vessel was lost & goes to the Insurer to get his vessel & paid a large Premium. & the Insurer when he sees the Premium paid

Lex Mercatoria.

the vessel had arrived safe in Port, the insured was ignorant of it. - the premium was to be returned.

It is a Questio vexata whether fraud on y^e part of the insured, so as to destroy the Policy, & discharge y^e insurer from all liability, whether in such case y^e insured ought to be allowed to recover back the premium? The argument that the insurer ought to return it is, that there has been no risk, & therefore to make the insured pay w^d be a penalty on him. - that this penalty is to go to a private person, & the Law it is s^d. knows nothing of, paying a penalty to a private individual. But reasoning from analogy we find it is not an unusual thing, that private persons are allowed to recover penalties. There are certain Laws in Society declaring that whoever commits a breach shall pay a certain sum, which is a penalty, & any person seeing may recover it. - It is usual to divide the penalty equally between the Informer & the Government. How is it with usury? There is a penalty on the Lender of y^e money. The whole bond or other security is void & no recovery can be had upon it. Here there is a penalty which goes directly into the Deft's y^e borrower's pocket. Suppos e.g. a vendor of smuggled goods sells them. Now by a Stat. in Eng^d. he never can recover one cent for them. This is a penalty inflicted upon him the measure of police ^{to prevent smug.} which is just so much money in the hands of the vendor. The idea of its being a penalty is used as an argument why the insurer sh^d. pay back

Lex. Mercatoria.

the premium is without justification. If there is any ground for it, it is because there is no risk. The rule formerly was both in Law & Equity ~~was~~, that it might be recovered back. 2 Vern 200. 2 S. Wms 170. 3 Sur 1264. But the rule is now certainly otherwise by the English decisions. & I think they are correct. But the reasons given in the cases are not the same. They say it is because no risk is run. Now it appears to me that this is not strictly true. There are many cases where it is true there is no risk run. e.g. when the insurer is on a warranty that the vessel shall sail with Company & she does not. Now here is no risk run. (But a point is a secret thing - a thin chance to one the insurer or when imposed upon never hears of the point & pays the money as on a good & fair policy - there is yet in my opinion a risk. as e.g. suppose the insured sh^d. tell the insurer all the circumstances correctly relating to the vessel, except that at a certain time she was on distress, all hands at the pumps & several feet of water in her hold. Now if no one survives to tell the story, the insurer will pay the money & perhaps never know that the insured was possessed of this intelligence at the time of the insurance made. Park 218, is the first case where this was held, & a later case in Campbell recognizes the same to be Law. And they say the reason of these decisions is on a ground of Policy. Both reasons are good.

There is one single case where there is to be no return of premium, ^{where} the interest is contingent. That is the case of the capture of Prizes. The Captains

Sir. Hercules.

are entitled to only a part, but by usage they get the whole
Prize. Now this may be insured, but it is uncertain
whether the vessel will be condemned or not & it depends
upon this fact. Suppose the Prize is not condemned, but
acquitted, Can the Captors recover back the premium?
No if interest was contingent, & as such it was insured. 8th R. 154.

It is true that in some cases there might be an
appreciation of the Premium - This is true - there are
such cases. I will state to you the grounds of it, which
is that all the risk has not been run. It is not in all
cases where the risk has not all been run, that the premi-
um is to be returned; for the general rule is, that if the
risk has begun to be run, there is to be no return of the
Premium. And here I sh^d. mention to you that it is not
whether it is by the pleasure of the insurer or not
that the risk has not been run. e.g. Suppose a Ship is
insured from N^o. 1 to London. & never sails. Now suppose
the insurer pay me back my money, for no risk has
been run. Now it is not in the mouth of the Insurer
to ask why he is not paid. it is none of his business.
Suppose e.g. the warranty was to sail with Convey
or, in other words, the insurance was provided she sailed
with Convey, & sh^d. soon sail. here is no risk. So if the
warranty is that she shall sail by such a day & she
does not, there is no risk run. Comp 668.

There are all cases of no risk. But I will men-
tion some where the risk has begun to be run. e.g. the
Ship sails on the voyage at the time sh^d. sail & is
retained the next hour. then there is to be no return of

Lex Mercatoria.

any part of the Premium. So if she was warranted to sail with Conway, & did, & after going, in 6 or a short time she purposely deviates - this deviation discharges the insurer, but there is to be no return of Premium, for the risk has begun to be run & the Contract was in law. Doyle v. Benson & Woodbridge.

But there are cases where the risk has begun to be run, & the Premium is to be returned. One class is of this kind. Suppose a vessel is insured from London to Barbadoes, & the Policy is 10^l p^{cent} on the outward bound voyage & 12 p^{cent} on the inward bound voyage, which makes 22 p^{cent}. But if it is all paid, and before she gets to Barbadoes she is lost. Now here the risk has begun to be run, but the risk has not begun to be run on the return voyage, & therefore there must be an apportionment made, & the 12 p^{cent} must be paid back. But if the insurance had been at 22 p^{cent} on the whole voyage out & in, & so it is in us to & outward & homeward bound voyage, there would be no apportionment. It is usual in almost all countries as well as the U. S. to make two voyages so much on the outward bound, & so much on the inward bound voyage.

Another set of cases which are the principal ones. You will remember that if a vessel insured to sail with Conway, & she goes from London to France she may go to the place of destination without any voyage if she is lost or going there the insurers are liable. Now suppose the place of destination is not the same

Lex. Mercatoria.

when she sails from London to the Downs the risk commences. When she arrives at the Downs the convey is gone - & she proceeds without convey. Now the Insurers are discharged. The insured say pay back the Premium - I won't say the insurers for I have run a risk - the risk has been commenced, for if you had but lost on your voyage from Lond. to the Downs, I w^d have been obliged to pay. What is to be done? The decisions on this subject have not been uniform. but it is now settled that they will consider it two voyages, one to the place of rendezvous, & the other from there to the Port of discharge. the insurer has run part of the risk & therefore there is to be an apportionment. The insurer is to retain a part in part of the Premium the quantities of which the Juries are to determine under direction from the Court. 3 Burr 1237. 1 Bos. & Pul. 172.-

This took up another set of Cases. Suppose the Ship is insured "at & from" - the Premium is paid. Now the Insurer is liable for all loss as well in the harbor as on the voyage. The fact is the vessel was in the harbor while & then is go the voyage is given up on the sails & does not comply with the Warranty, which discharges the Insurers. Can the Insured recover back the Premium? The Insurer says, I was liable, & have run the risk of all loss which might have happened while the vessel lay in the harbor. In the first Cases it was said the Premium was not recoverable, & the insurers to retain it. The principle is said to be overruled in subsequent Cases. But I have seen

Lex Mercatoria.

no case where it has been decided, except where there has been an usage to do so. And in all the cases where the party, Premium was in part returned, the party paid an usage. Month 566. 7. 8. 9.

Now I see no reason why the principle is not the same in this case, as in the former where the sails to the place of Rendezvous. I see no difference between the two cases.

In case of insurance for a limited time, the risk is not so long as they expect, yet there is no return of Premium. Suppose the insurance is for 12 Months, & she returns in 3m^o. there is no apprehension of return of Premium. They agreed on y^e time & they are bound by it. —

Sept^r 15th April 8th 1813.

It is often stipulated in the Policy itself that there shall be a return of the Premium, on the happening of a certain event. There is no warranty about it on the part of the insured, and there is a stipulation that if the sails with Convey, or at such a time, or sails with many Guns being on time & (and) the premium is to be returned. It is an agreement between the parties as governed by the Contract. There is a case where it was held that if she sailed with Convey & arrived part of the Premium was to be returned, but if she did not sail with Convey & arrive, nothing was to be returned. She sailed & arrived a partial loss had happened. The insured contended that it was not obliged to return the premium, as there had been a

Sex. Mercatoria.

Partial loss. But the Ct held that this was a contract between the parties, & they must be bound by it. The partial loss was insured vs. Douq. Simon & Co. Douq. & Co.

In another case of the same kind of insurance, she was captured & recaptured, & the partial loss the insurer had to pay. but the Premium was in part to be returned. 7 T. R 421.

In another case the vessel was insured from 0 ports to London. If she sailed with Convoy the part of the Premium was to be returned. She sailed from 0 ports to Lisbon (the place of rendezvous) with Convoy, & then was to sail under protection of another. But she lost her first Convoy, & the other was gone, & she sailed the remainder of the voyage without Convoy & returned safe. The Q. was, whether part of the Premium was to be returned? The Ct. determined it sh^d be. Not because she actually did sail with Convoy, but on another ground that it was the best she could do. her departure was not voluntary. They considered this as sailing with Convoy. 1 Bos & Pul 11.

In all cases where the Premium is to be returned, the Insurer has a right to one half per cent. This is for the trouble he has had. It was for the fault or misfortune of the insured that the risk is not run. If she is insured to sail with Convoy, & does not, the insurer is discharged, the risk is not run: the Premium is to be returned, but the Insurer will retain 1/2 per cent for it is the insured's fault that she does not sail with Convoy. If the insured has been put to trouble. 2 Doug. 152 = 167.

Sec. Mercatoria.

I shall now notice that species of Lending which
is a kind of Insurance, known by the name of

Bottomry & Respondentia Bonds.

In Bottomry Bonds the money is loaned and the Ship is
pledged for the security of this money. It is agreed that if
the ship is lost, the lender loses his money, none is to be
returned. If the ship returns the lender receives the money
with the marine interest, agreed upon, but it what it may
no matter how exorbitant. it is not usury, it is a bare
game of hazard. These bonds are most frequently given
by persons commencing business ^{without capital}. They borrow money
if the ship arrives, they may make a handsome profit
it, & be able to pay the lender. if the reverse arrives they
have nothing to pay. This is called lending money on
Bottomry Bonds. I said but the interest be ever so exor-
bitant it was not usury for it is a principle that
it is never usury where the principal & interest are
proportioned. it is then a fair bargain at hazard. This
is the same in all cases where there is this hazard. it is
not usury. as e.g. the case of an annuity. 2 Bl. C. 458.
4 T. R. 353. Cro. T. 268. 508. Maior. 413. R. 27. 125. 54. Munt 238.

The Ship & tackle are not only insurable of course
here, but also the person of the borrower for the money lent
& the interest. 2 Bl. C. 458.

Respondentia Bonds differ from Bot. Bonds in this
the Ship is not pledged, but the goods & merchandize are.
& these goods are always on the bottom of the borrower & are
pos. of and at any time ready to be sold or to change
in the course of the voyage, only the borrower personally

Lex. Mercatoria.

is bound to answer the Contract. & that i.e. so, it is not much more than a personal security, but this bond is frequently entered into, & with the same marine interest as Botley Bonds, & put in hazard in the same way. 2. H. C. 458.

You will observe that in this case, the money is always at the risk of the Lender, & therefore it differs from all other loans, for in all other cases, the borrower runs the risk. In many respects it resembles an insurance, - the Lender in this case, loses his money in case the vessel is lost. the insurer has to pay it in case of such a loss. The Insurer receives his premium, & the Lender his marine interest. If no risk is run, the Lender receives no interest, more than on another contract as e.g. if the voyage is given up. the money is to be repaid to the Lender with simple interest. but there cannot be a recovery of marine interest, any more than a premium can be recovered when no risk is run. In many respects then it is a kind of insurance; in others however, it differs materially. The insurer insures nothing. but here the Lender furnishes all. The insurer becomes a debtor as soon as a loss happens but the Lender never becomes a debtor. If the Ship is lost he loses his money, & the borrower is discharged from his Contract. The insurer has no claim on the property insured - but the Lender has. Again, the insurer is always liable for an average loss, for a partial loss generally, but the Lender is never liable for a partial loss. & there should be a damage policy. Lender loses nothing by it, if the Ship arrives, there is

Lex Mercatoria.

one species of general average for which the lender is liable. If a loss happens for the purpose of saving the ship, the lender must contribute as well as the rest. He is liable for the average called general average - and so much is to be deducted out of his marine bond as his share or proportion amounts to. The principle is, it is for his interest, for if the ship is lost, he loses all, & therefore the Jettison is as useful to him as to any one. That loss which is occasioned by Jettison is called general average. The origin of this custom of this custom of plugging the ship doubtless was, that the Master being in a foreign country, was allowed to hypothecate the ship's bottom in order to raise money to refit. The Merchants there to agree to furnish him money to relieve his wants, if he would pledge the ship. This gave rise to the custom, & it has now become a very common practice. The money must be put in the contract to be for the use of the ship, & this must be the real fact, that it is for the use of the ship - not for a wagering contract. The law is as strict as a wager of this kind as any other, & if there is no risk it is treated as a wager. 2 B.L.C. 400. Book 1. 12. Story book II. Chap. 14.

The marine interest, you will observe, never touches till the next commences. If the ship sails the next commences with the next date the bond is good only for the principal & simple interest. There is a case where a charter was entered into. The charterer would not lend his money unless the person wishing to borrow

Lex Mercatoria.

would enter into a covenant to perform the voyage. He did enter into such covenant but never performed the voyage. Still the lender would have no recovery of a Marine interest, tho' he might sustain an action on the covenant, but that is a different thing. The lender would be allowed his one half p. cent. 1032 263.

The money is due when the vessel arrives. Now suppose it is not paid & the lender sues, what will he recover? He will recover the money lent, & the marine interest & paid up to the time it was due, i.e. the time the vessel arrived, & simple interest from that time till it is paid. No marine interest is allowed after it becomes due. 4 Viner at 281.

The rules are the same generally speaking as in case of insurance. If the vessel is lost either by Storm Capture or in any other way, the money is lost. But the loss must be a total one, to discharge the borrower. The lender is not liable for a partial loss: as e.g. if the Ship is captured & recaptured, & the cargo, no deduction is to be made by the lender, for the partial loss or being carried out of her way. Marshall 652.

The Ship may be lost, & yet under such circumstances, that the lender will not lose his money. but these are cases where the insurer will be discharged. as of e.g. the Ship was not Sea worthy. or if she is lost by the gross conduct of the Mariners. Now in such case the lender does not lose his money, for an insurer will not be liable for the loss, unless he insured as cargo of the vessel. 2 Emerigon 504.

Sec. Averaging.

. If lost by smuggling is misadventure, but if the
loss is owing to the smuggling, as if he lends his money
on a smuggling voyage, he will lose.

If the ship deviates, a Qu. arises - Does the owner
lose his money? No. Does he lose his marine interest?
I think not, for the risk has begun to be run - there is
no case where this is decided. But because from an ar-
gument - the insurer in such case w^d not lose his premium,
I think not. Does the owner lose his marine interest? The ma-
rine interest is the Owners Premium, & in this respect it
resembles an insurance. Stair 152.

Changing the Ship without any necessity will
discharge the owner from loss, as such an act w^d discharge
the insurer.

As to the time, it seems that the risk ceases, the
moment the ship anchors at the Port of destination.

With respect to the Qu. of general average there
is no Qu. about it at G. S. M. But there is a custom in
Eng^d. that in this case the owner on a Rotterdam Bond is
for nothing at all. Stair 423. But from that case it is
apparent that the custom in Eng^d is not the S. M. in other
Nations. The G. S. M. is that he must contribute, when
there is a general average. And there is the best reason
for it. which is that by the pollution, his principal in-
terest is saved. Stair 423.

In case of insurance the G. S. M. on all coun-
tries is (altho the Eng^d practice & ours is different) that
when a man wants to insure he must go to G. S. M.
usually. But the practice in Eng^d & in U. S. is to sue

Lex Mercatoria.

in the Com. Law Courts & have a Trial by Jury, whether the action is on a Policy of insurance or on a bill of lading. Equity Courts have nothing more to do with these cases, than they have with Cases at L. L. To be sure they can compel a policy to be given up, on a disclosure of certain circumstances. They will in such case do the same way as in other cases. Suppose a man takes a Policy in his own name, for another person. now they will say that he is trustee for this other person. But they have no more power in these than in other cases. 1 A. & K. 437. 2 S. & B. 357. 3 Bro. Parl. Cas. 525.

There is a very common provision (a clause) inserted in the Policy that if any difficulty arises, it shall be submitted to & settled by the Chamber of Commerce, but this provision is negative. For suppose the man who owns the Policy will sue; can you plead this provision as a defence? No. For it is a principle that the Parties can never oust the Ct. of their jurisdiction by any agreement they may enter into. tho' they may be liable on the agreement. 2 Burr 1042. 1 Will 129.

What is the action on a Policy? It must be assumpsit of tort vs underwriters. In case of negotiations, as in Insurance Co. v. Angl. it is assumpsit, for they cannot act without Seal. But is underwriters it is special Assumpsit.

The Declaration begins by reciting that there is an agreement, that it was made according to the custom of attaching this & that, or according to the usual - After stating the Policy the declaration

Lex Mercatoria.

you on to state all the express warranties attached to the Policy, as that she was to sail with Conroy &c. & then state the Premiums in consideration of the Policy, and that it has been paid. He then states that for a certain sum he agreed to insure & subscribe y^e agree^t. (i.e. that y^e Policy was made & subscribed). The insured's interest is then stated; if the Policy is a valued Policy, that it is y^e sum agreed upon; if it is an open Policy that it is the sum subscribed. He then states that the ship sailed on the voyage insured, & if warranted to sail with Conroy, or at a particular time, that she did so. In short a compliance with all the warranties must be stated. He then states the loss which was insured vs. & that the manner of the loss was insured vs. as if happens by Capture he states that insurance was insured vs. He then states a notice (of the loss) is the defect and a demand of Payment, & lastly that the Def^t refused to pay. i.e. it states a liability on account of non-payment. I state the form of this, because it is a technical thing. The forms are always to be found in the Elementary writers; but we sh^d. understand the Law. No man can draw a declaration by looking at a form, & know nothing about the Law. If a person knows the Law he will always be able to draw a good declaration, the perhaps it may not be a handsome one. I don't advise you to draw a declaration in y^e first place without a form, & then you may take a form and compare them.

It may be that the loss has been adjusted, and

Lex Mercatoria.

case you draw a declaration just like the above, & the judgment is prima facie evidence of everything except the non-payment. You have nothing to prove but the adjustment & the non-payment. The contrary however may be shown, as that there was no consideration, or some other defect. If the Policy was effected by an Agent, it must be stated that the Contract was so made by an Agent, & if he brings the action. There are some questions of this kind. If a Policy is made to insure goods of A. B. and before the loss C. is taken in as a Partner. Now can an action be sustained on that Policy, being lost by A. B. without joining C. upon the ground that whoever has an interest ought to join? The Ct. determined that the action in the name of A. B. & C. be sustained, & that it was sufficient if lost in the names of the Partners mentioned in the Policy. 9 Bos. & Pul. 155.

On the same ground if one of two Partners insure and not both, & the action is lost in his name only who insured, it is good. And I fear see no reason why this not convert the Contract it made by one partner into a contract with the insurer whether he is bound by it alone or by A. B. If the Assured sue for the Premium, he must sue both. 4 B. & C. 212. 11 B. & C. 296.

One thing further, when you sue for a loss you must aver the loss to have arisen from a cause insured vs. When you state your loss you must state it currently - & if you are insured vs. two parties & state your loss to have happened by one when it happened by the other, you cannot recover on that action. The most

See. Mercatoria.

case in Ireland was of this kind. The vessel was insured
vs detention by "Kings Princes & People" and also "vs Stranding".
The insured lost their action vs the insurers, aver-
ring that the loss happened by detention (within 7 Policy).
The fact was a mob assembled & took the ship, & so being
ing her in she was stranded. Now the Ct. held thus: it
be no recovery in this action because this mob were
not the "People". They c^d have recovered if they had aver-
red that the loss happened by stranding but as they as-
cribed the loss to a cause, which was not the one, they
c^d not recover in that action, they might bring an-
other action, averring the loss to be by Stranding p. 45. R. 723.

Feb. 15th. 1713. 4th April 1713.

I was observing to you the necessity of stating
the loss correctly, that it might appear to be the loss
insured vs { there be repetition of no case above } I should observe
one thing to you you will remember that losses may
happen & yet the Insurer not be liable for them. e.g. if
your insurance was vs capture & a warranty that
she w^d sail with convoy & did not - she was lost not by
capture but by storm the convoy was to protect from
capture. The insurer was not liable. Attend to the prin-
ciple a moment & you will see the reason. The war-
ranty was a condition precedent, if that is not con-
firmed there is no Policy. So that in all these cases it
is immaterial how she was lost, if the warranty was
not complied with. If you make an assurance that she
is not to be lost by capture & she is lost by capture then if the

Sec. Mercatorii.

Warranty was not complied with, the Insurer was never liable for any loss. In other cases you must aver how she was lost, & if you mistake the loss you cannot recover in that action. as e.g. Suppose you state the loss to be perils of the Sea, & it turns out that it was not by Perils of the Sea but by Capture (&c.) you cannot recover. As in the case of the *Eng. vessel* insured as perils of the Sea & by Storm she was driven upon the Coast of France & there captured. The Perils of the Sea were no doubt the cause of her loss, i.e. if there had not been a Storm she w^d not have been captured. But the immediate cause of the loss was the capture. And of the Declaration state it to be by Perils of the Sea; it w^d be bad, for in Law it is by Capture. Park 62. 4 T.R. 723.

The case in Park 62 was a *Qu.* whether the loss was by the perils of the Sea. The vessel was one employed in the African trade - & owing to a long spell of dull, cloudy weather, the Capt. this negligence or ignorance made a mistake in his reckoning & got out of the way. The voyage was very much prolonged by the bad weather, the negroes became sickly & many of them died. And the *Qu.* was whether the Insurers who insured as perils of the Sea were liable? No doubt had the weather been good but the Capt. w^d have continued in the right course. But the Ct. held it was not a loss by Perils of the Sea. The immediate cause was the mistake of the Capt.

The best way is to state the loss exactly in the words of the Policy - as e.g. suppose *Insurer* was insured as is, & the loss was occasioned by Barratry - you will state the loss in the terms of the policy as by Barratry.

Lex Mercatoria.

But this is not necessary - if you declare in language that constitutes sufficiently the loss insured vs. it is the same as stating the loss in the words of the Policy, as in the example last put. Suppose you state that the loss happened by fire in the steamer - it is sufficient - your name is currency. In one case it is said "this grant negligence of the Master" - negligence however is not necessary - if the negligence was gross, it amounts to fraud. 2. Hay. 1349. 18th Feb. 581.

When the Insured sue to recover what they have paid, as for Salvage repairs &c it is not necessary to state this particular thing - they must state the loss & that it is a loss insured vs in the Policy. If e.g. the vessel was insured vs Perils of the Sea & they were stranded in a Storm, they may state the loss to have been by the Perils &c. & the *quo modo* may be given in evidence. 7 Chanc. Cas. 364. See also cases cited here.

There is one case where you need not state the Policy at all - & this is when you sue for a return of the premium. You sue in an action for money had &c. & give the Policy in evidence - & you prove no risk has been run, as if she was to sail with Convey & die not. The insured recovers all but the 1/2 p. Cent. that the Insurer retains.

So far of the Declaration - But further: Suppose the Declaration is good, the Deft. comes out &c. & pleads the general Issue - non assumpsit. Now the Plff must state all his allegations - his whole case. He will say &c. & state how he must prove it. The Deft. undertakes the Plff. knows that the Plff. can prove all he has alleged, may

Lex Mercatoria.

himself show many things that will discharge him - as, he may show any thing that renders the contract void *ab initio*, or any subsequent fact which will discharge him. He may show the illegality, tho it does not appear on the face of the contract - if it does appear advantage may be taken of it upon a demurrer. He may show that the *plff* had no interest, & therefore it was a mere wager. He may show that the *plff* made a fraudulent representation which will discharge him - that the *plff* did not disclose certain facts with which he was acquainted, the concealment of which will discharge him. He may show that the *plff* was not *bona fide*. He may show that the voyage was not the one in which the insurance was made, or that there has been a deviation - all these will discharge him. He may show that there has been no loss, or that it was one not insured *vs*. He may show a non-compliance with some one of the warranties which will discharge him & no possible way is left for a recovery *vs* him. He may show that it was a double insurance, & that *plff* has been remunerated, & received full satisfaction of another underwriter or Insurance Co? & then *plff* has no claim or debt for he is entitled to but one satisfaction - tho the *plff* may be liable to the underwriter who has paid the full amount, but this is a distinct thing. Suppose the insured has claimed for a total loss, & the Insurer considering the loss as only partial but believing it must as he thinks be so - Now if he is sued for a total loss he should plead: and

Lit. Mercatoria.

as to that amount & not a deposit as to the residue -
if he can prove to the jury that the amount by him
tendered was sufficient, no costs will be recovered of
him, & jdg^t. entered up for the amount tendered.

1. You here make a difference between C.D. & C.D.
N.C.D. - At C.D. you can plead a tender only when the
sum to be paid, or the duty to be performed is certain
& ascertained. as e.g. you can tender the money due on
a note. Bond &c. for this is ascertained. So if you are
to deliver a House a tender may be made. But when
the amount of damages is uncertain, it will require
the intervention of a jury to ascertain a plea of ten-
der is not good. as e.g. in the action of Tresspass you
cannot tender the damages here, for it is uncertain
other is no standard by which it can be ascertained,
it must be determined by a jury. So if one contracts
to build a House for another & does not, there is no
standard to which you can resort to ascertain the
damages, & of course a plea of tender is such as is not good.
But if you have a standard to go to, a tender may be
made. as if it agrees to deliver to one hundred Bushels of wheat
and does not; here you can ascertain the worth of wheat
at the time it sh^d. have been delivered & this you may
tender. the damages here is certain & ascertained, for the
measure is "id est certum, quod potest reddi certum." But
it is otherwise in the case of a House, for here although the damages is
wholly uncertain (as if the loss is partial still if you
suffer to give more & tender as much as the Triers
think is due. your tender will avail you a good deal

Sec. Mercantile.

defence. Suppose he admits to tender before the suit is
brought. Can he afterwards make a tender? The practice in
court & in some of the States is to allow the deft.
to bring the money into Ct. & tender at any time before
the Court goes to the jury. The U.S. rule is, that there
can be no tender after the suit is brought. But accor-
ding to our practice the costs must be also tendered
which may be ascertained by referring to the estab-
lished bill of costs. In Engd. & in those of the U.S.
where they have no practice like this, the money can
be paid into Ct. - it will not clear you of costs. And
the rule on the Engd. Chy. Ct. is the same as ours on Cont.
You may tender at any time & take advantage of it.

Now suppose a man is a partner in a firm, & the firm is
an alien enemy - a U.S. man, at the time when he
might be a partner? Now what is the law as to this? I think
I have known this it is safely determined. If he was once
an alien friend, but has now become an alien enemy a
contract made prior to the war ^{was} the enforced some time
either before or after the war - but during the war an
action cannot be maintained on it - it must abate
till the war is over - it is a temporary bar - a mere
matter of abatement - The next question is, what is the
rule made during the war - now what shall be the rule?
It depends upon the legality or illegality of it. What is
the law? If the contract is illegal, he may sue the
Gov. if he is a citizen, which renders the contract
void. I say if the contract is illegal, but all contracts
with an enemy are not illegal. If a man is a partner

Lex Mercatoria.

a contract with an enemy to furnish him with provisions &c. is illegal - but suppose a ship was taken at sea & the Capt. entered into a Ransom bond to pay a certain sum - now is this a good contract? I conceive it is - It alleviates the calamities of war & is of advantage to commerce - but yet no action on principle can be maintained on that bond during the war. Tho' after the war a recovery may be had upon it - & this corresponds exactly with the cases I mentioned to you in the commencement of this title. Whether contracts with an enemy are legal or illegal depends upon the circumstances. I have no doubt that if in a common law action I should give my note to an alien enemy for a sum borrowed from him but it w^d be good. The illegality consists in strengthening the enemy willingly. Therefore it is that contributions made to save a town &c. from being destroyed have never been supposed to attach guilt to those who contribute. neither is it considered as aiding & assisting the enemy willingly. If a person is a prisoner on board an enemies ship, & he comes into action & they compel him to fight, he is considered guilty of no crime in doing it. Compulsion acquiesces but it does not make him guilty. On the same ground it is, that if a soldier gets possession of a part of the country, & quarters his troops upon the inhabitants, & compels them to furnish provisions &c. they are not guilty of any crime.

In proceeding with the subject you may perceive a difficulty arises in case there are a number of subscribers to a Policy. I have seen an insurance

Lex Mercatoria.

Subscribed by 20 persons, & all for different sums. Now these are all distinct contracts. Each one is liable for the sum he subscribed. There are as many rights of action as there are underwriters or insurers. The practice in Eng.^d formerly was to bring an action vs each. the Ct found this a very mischievous grievous thing. The first thing done to obtain relief was to apply to Chancery, and they decided that if the applicants would submit to the verdict in vs one, i.e. if they would agree to abide the judgment vs one, & divide the same according to each ones interest, this sh^d settle it. There is generally a rule of Court. (i.e. in those States where they have no Chy. Ct, but where they have the practice is as above), which is that when these suits are brought, if the insured will, never apply to a Ct. of Chy. nor bring a writ of Error, but agree to abide by the judgment vs one, the Ct will then consolidate them, & thus relieve them of the inconvenience of having an action vs each one separately. Suppose the suit is brought vs six, & they come into Ct & wish their cases to be consolidated. The Ct make a rule that if on the trial vs one, the Defendant will agree to abide the judgment vs that one, & agree not to bring a writ of Error, & will furnish all the necessary evidence, as papers &c then that & all the other suits shall be consolidated & one trial shall decide the whole. But suppose the plaintiff will not agree to it. The Court cannot compel him, but if he will not agree they will continue his case till the end of time, but this cannot be said to be compelling him to agree, yet it has the same effect. If the Defendant will not agree

Lex Mercatoria.

the C. C. suffers the plaintiff to proceed vs each of them & make them as much liable as he can. This rule of C. C. is nothing more than was formerly done by Chy. You suppose an error creeps in, as if a material averment is omitted in the Declaration, & notwithstanding the agreement the party brings a writ of Error. Now the C. C. cannot say there is no error when there is one - merely because the party has agreed not to bring a writ of Error. In such case they will treat it as a contempt of Court, that is to say they will imprison him.

Much has been said as to the difference in testimony betw. a mercantile suit, & those at C. C. I must say that I do not find any material difference. - I know of one case, standing alone, where it is S. P. parol testimony may be introduced to control a written contract. This is not Law. I shall mention this case under the head of "Proof", you may be as certain of having the advantage of a written contract ^{in a mercantile suit} at C. C. as at C. L. Is there any difference then? There is a case of this kind where it is said there is a difference - there were a number of underswriters. say 4. A. B. C. & D. - A is sure, & B. is too. or to prove fraud (you will observe there is no consolidation rule - he is excluded on the ground of interest - well what interest had he? Why he wishes it might recover for if it recovers he supposes he might. But if judgment on the suit, B. & A. could not be introduced as evidence in an action vs D. - The truth is he is interested only in the question, & formerly such an interest excluded from testifying - but now it does not.

Lex Mercatoria.

he might be admitted a witness, as you may see in
S. & P. 283. in a note. He certainly would not be ex-
cluded now, see the case of Post & Baker in 3 S. R. 27.

There was a case of Bowden, a broker. the insur-
ance was signed by A. B. & C. - it was not filled up, & the
broker put his own name to it. when A was sued, the
broker was called as a witness. there was no consul-
tation rule. but there was a bill filed in Equity

stayed by the decision, & that & decided him
as much as any thing else. But the Defts. got together
& gave him a discharge from any liability as to costs
& entered a withdrawal of the Bill in Eq. - the Deft. did not
admit the withdrawal on purpose that he might keep
him from testifying. - But the Ct. admitted him - when
the Bill was withdrawn his interest was done away.
The Ct. give several reasons for admitting him. Ch. Jus.
Kingon's was "that he was not interested" Ashurst says
"the broker had no business to sign, his signing it, was
void, as by signing he could not prevent himself from
testifying" Buller says "he ought to be admitted there
the exception to the general rule of evidence which is
"Ex necessitate rei." All I would by this is, that the bro-
ker is admitted on some ground or another, & I believe that
in all cases where an Agent is called upon to testify
he should be admitted. I do not believe this can differ
from C. T. rules. But if it does differ, it is a single
case & forms an exception to the general rule
of Evidence upon this subject.

See Memorandum.

Of Proof

My great object here is to make plain, & bring up to view the Law you have already heard on this subject. Now the case is in Court & the parties bring forward their testimony. What is to be proved? The first thing for the plaintiff is to prove a contract - for this purpose you introduce the Policy - but this does not of itself prove it. you must prove the subscription of Def^t. & then the contract is proved. But it is certain no, parol testimony can be introduced to control this written policy, except indeed where it is illegal; altho there is one case which I mention'd to you above where it is so, parol testimony may be admitted to control the written Policy. it is not Law. Skinner 454.

Are there any exceptions? We do know that writings may be introduced to show the usages and customs of a particular trade, & explain them. As e.g. Bottomry Bonds are not insured under the term "goods" - but there is an usage in the E. India Trade that the insurance on goods will include Bot. Bonds. Now parol testimony may be introduced to prove this usage. But you cannot enquire the opinions of the witness. He is consulted as you w^d. consult an author - i.e. to ascertain the existence of a fact. So in another case where part of the premium is to be returned. The ship is warranted to sail within 30 days - now all agree that she may sail to the place of rendezvous without coming & if lost on the way there, the insurer is

Lex Mercatoria.

liable. The suit's thrust goes no farther. The risk has been laid in part real, & there must be an apportionment of the premium. How much must be put back? If there is an usage about it, it may be proved by parole. An usage in the S. C. is the same as a custom at C. D. - But you cannot enquire of the witness, what the Law is. } There the Judge gave us a long dissertation on a custom in Conn. relative to bees found in a hollow tree. not very important. [S. P.]

Sedure 17th April 10th 1813

These Policies of insurance are frequently procured by Agents. & the warrants are subscribed by Agents, i.e. Agents of the insured. If their subscription is denied, their hand writing is proved as in other cases. But they may also be compelled to show their authority. The Power of Atty. is always in their own hands, but there is scarcely a case in the Books where this power has been doubted. - in other transactions circumstances in this way, much difficulty would take place but among merchants there is seldom any doubt as to the Agents power unless it is downright forgery. These agents make it a business to act for the insured. You may see a case in 10 Esp. R. 61 where it was proved the man had been in the habit of subscribing for the insured, & tho he had no power of Atty. &c. yet the Ct held this sufficient. - it was a sufficient power till contradicted.

When the insured sues to recover, the insurer never can allege that he has not received

For Maritime.

the Premium. He has subscribed the Policy & acknow-
ledged he has received it, & the production of the Policy
is sufficient evidence in this action, that the premi-
um has been paid. But when the Insurer sues to recover
on the premium this acknowledgment in the policy
is no evidence to him. it is no proof that it has been paid.
There must be an interest in the insured; else the pol-
icy is not good, & this interest must be proved. It
may be shown by the bills of sale, invoices of the Goods, char-
ges of the outfit. These all go to prove an interest. There
is no great difficulty in proving an interest in a Ship.
She is cleared out in the name of the insured; & if not
the bill of sale can be produced. The Custom House du-
ties & clearances go to show it. 1 Esp. 8. P. 373, 209, 2 Stra. 1127.

A general averment of interest is sufficient.
the insured under this averment may prove any insur-
able interest, any thing on which the Law allows an
insurance to be made. As to the recovery, this is reg-
ulated just according to the proof of his interest and the
Loss. The quantum must be proved. But if it is a
valued Policy & the loss is total, he need not prove any
thing. the quantum is agreed upon in the policy, & is
proved by the Policy - but this is but prima facie evi-
dence for if it is a mere evasion of the Law to carry
on a wager, it may be shown. but if that is not
the case, the recovery will be the quantum agreed upon
in the Policy if the loss is total; if the loss is partial
the ^{value} Quantum of the loss is the Quantum. Responsi-
bility Bonds are to be insured in their own character.

Lex Mercatoria.

except where usage regulates it differently - as in the East India trade. 3. Bur 1394. 1400. 1 Bl. R. 420.

If a respondentia Bond is insured, the bond itself is prima facie evidence of the interest. 1 Bl. R. 396.

The insured then having gone thus far, having produced the policy, & shown that Def^t. subscribed it, either by himself or agent - having shown by the policy that the Premium has been paid - that there was an interest - & showing the Quantum of recovery, if he is entitled to any, as if it was an open policy proving the loss, or if a valued one proving a total loss, or if a respondentia bond, by exhibiting it - & having shown the warranties if there were any and that they have been complied with & then shows that he has a right of recovery, as if she was warranted to sail with convoy, or to sail by such a time, or to sail with so many guns & so many men &c. he must show that these have been complied with - or if warranties neutral he must show she was neutral, as by the clearance from the Custom house or the adjudication of a Foreign Ct. deciding it to be neutral - it then lays on Def^t. to prove her not neutral, or if she has forfeited her neutrality, proof that she was condemned on that account is sufficient evidence. She must be condemned however according to the Law of nations or of a treaty, else it is no evidence. The true loss must be set out in the declaration, & the proof must concur to prove the loss alleged, for there can be a loss & one insured vs. y^t if that.

60

Lex Mercatoria.

was then very high. I^d. have sold it for \$15 p^r. barrel -
i.e. now in this way he can make up a very kind
some bill. he can say he would have made a great
voyage & much money, & perhaps it is all true...
But the C. cannot go into this. So on the other hand the
vessel might have been lost before she got to her
port of discharge - it depends on a contingency.

There are remote damages into which the C. make no
enquiry. The enquiry in such case is what were the
immediate damages? The man may have been at
expense in procuring his load &c. this is immediate
damage which can be proved, & for this he will recover.

I can see no ground for saying that more remote dam-
ages are recovered in mercantile transactions, than
in those at C. L. Suppose a man contracts to deliver
1000 bushels of wheat by 1st. 1st. 1800th. & he does not. What is
he to pay? Why just the value of the wheat on that day
& altho it may have arisen in a week after to double
its then value, still the price at 1st day is the rule
& this only he will recover together with 7% interest.

1st. R. 130 notes. This was a case of a Ship engaged in
the Slave trade. there was an insurrection in the port
ing 105 the lives of all the negroes who should be killed
in consequence of mutiny. They mutinied, & to quell
them the sailors were obliged to shoot among them.
Some were killed, others wounded who afterwards died.
The rest grew sulky. Some starved themselves, others
killed themselves by dashing salt water, & others jumped
overboard, & were drowned. The Dr. was, for how many

Lex Mercatoria.

the insurers were liable? The Ct decided that those who were shot & those who died of their wounds were included in the policy & those only. Any immediate damage you may prove, & so any thing you have paid for salvage &c. under the policy without stating it was for salvage &c.

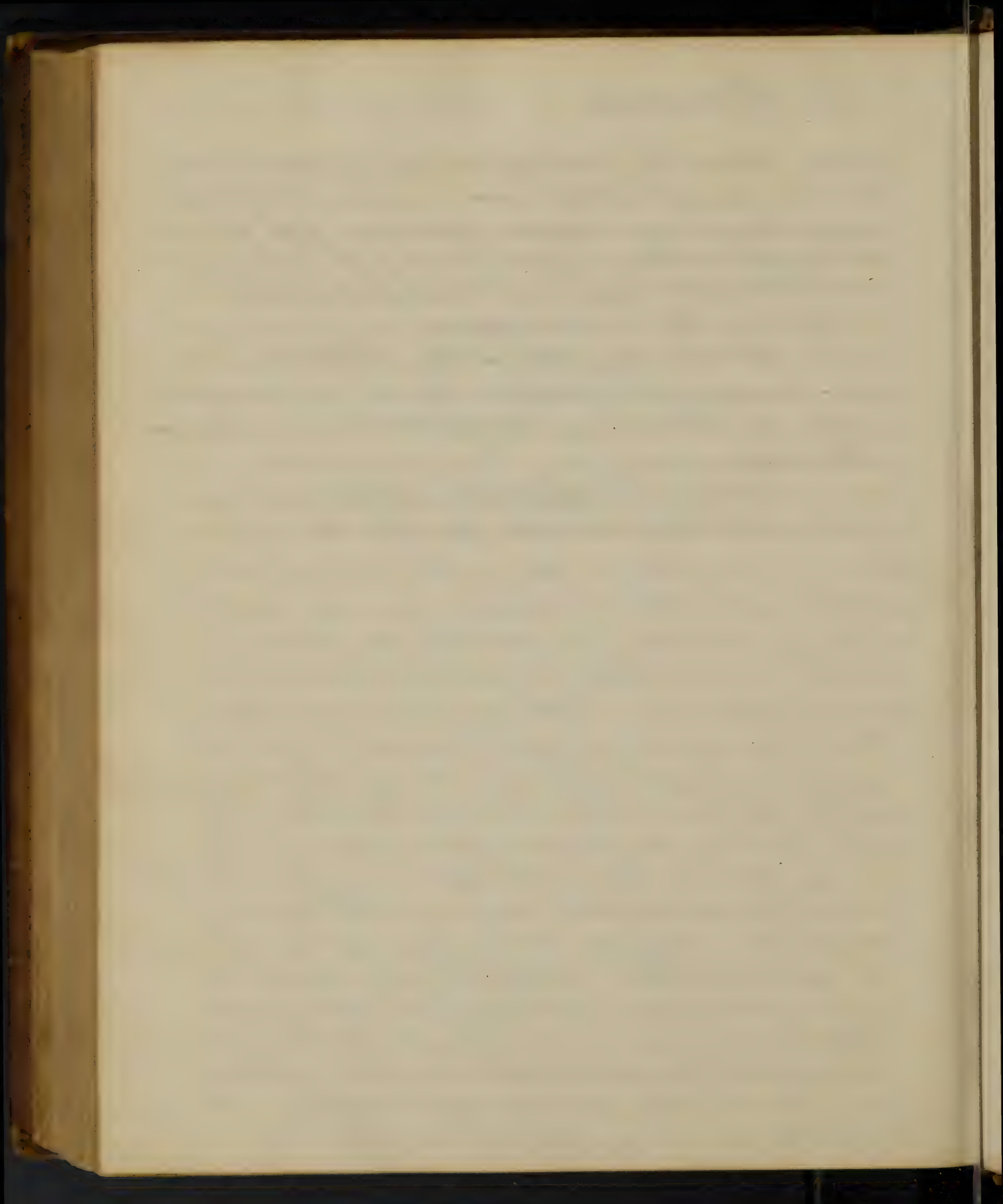
You come to a subject, where it is said a distinction exists. If there is one I am unable to discover it. It seems the cases are contradictory. It is s^d. that an insurance of wages & provisions is not within the Policy on the Ship, i.e. there are cases to this point. They say these must be insured as such particularly - I mean the wages of mariners while laying by as for repairs &c. The Q. is whether when they insure the Ship they are obliged to pay these wages &c. of the mariners, or in other words, in a suit on a policy on a Ship can these wages & provisions be given in evidence for recovery for them? The cases that urge this idea are in Park 52, 54, 151, 152, 153. Since these there has been a decision in the Ct of N.B. which was this - there were Banks souls on the Island - there being no houses near, & the provisions were taken out of the Ship & put in one of these Banks souls, while the Ship was repairing. The Banksoul was burned, & the provisioning lost. The insurer ^{on the Ship} was sued for these provisions, & the Ct decided that he was liable. They considered the provisions the same as if on board the Ship & had they been on board the insurer w^d not have been liable. 4 T.R. 208. Now it appears to me that these cases are not contradictory in principle. They may however be a difficulty if charges &c. are intended. There is no doubt that this case overrules & above

Lex Mercatoria.

Under the words "Goods wares & merchandise" in an insurance, provisions are not included. The reason is they are considered as appendages of the ship. So the Capt's clothes & goods cashed to the Deck are not included under the general words "goods wares &c" — unless specially named. Par 20.

It has long been a Qu. whether the party can recover for a partial loss, when he sues for a total loss. But it is now settled that he can. 2 Bw 909
1130. 10. 175.

I have now finished the subject of insurance so far as respects mercantile transactions.



Of Insurance on Lives.

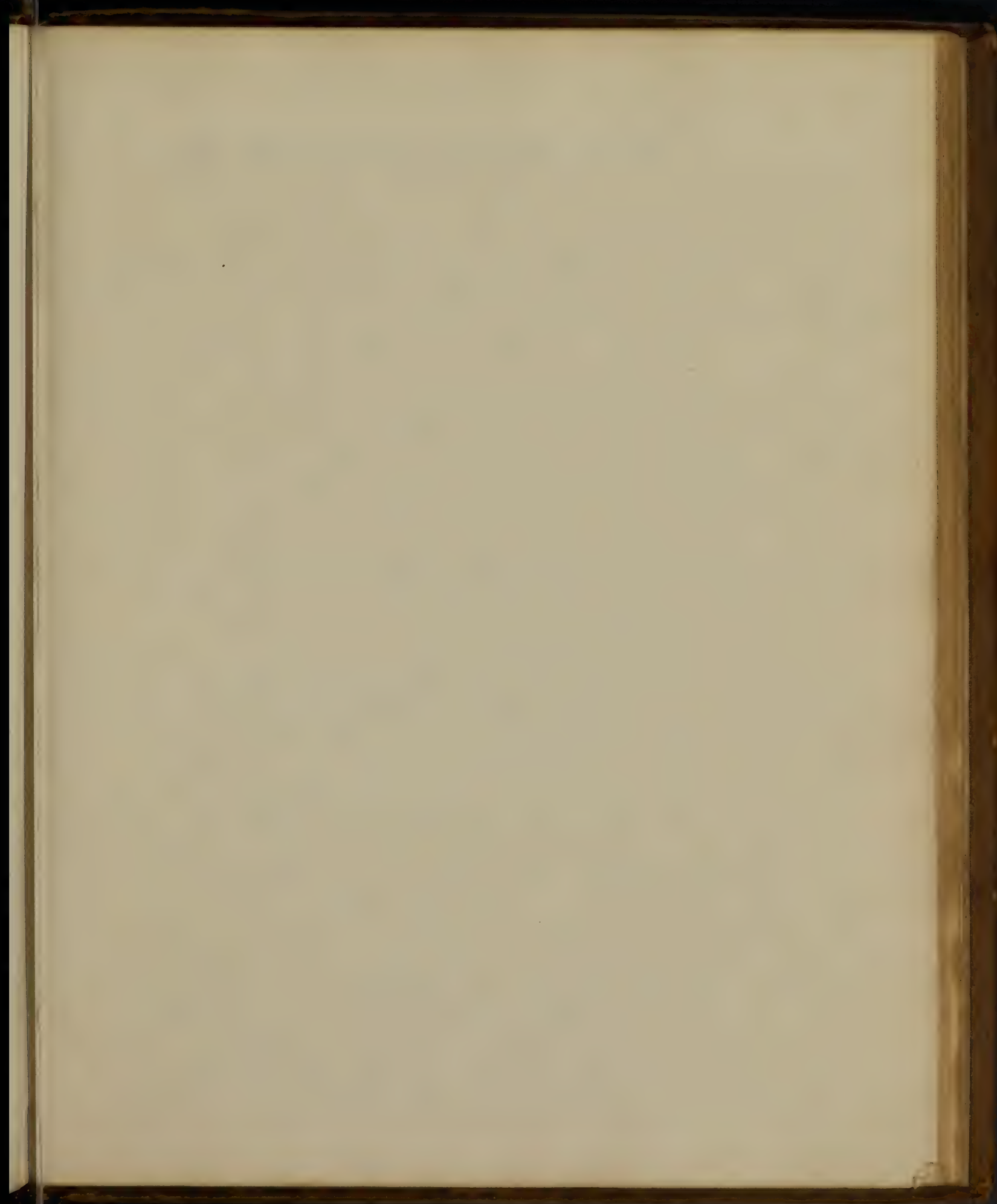
An Insurance on Life is to insure the life of a person for a certain time, for a gross sum of money, a premium. It may be by way of an annuity, paying so much yearly - or it may be to pay such a sum if the insured dies in such a time, if he does not die in that time nothing is to be paid.

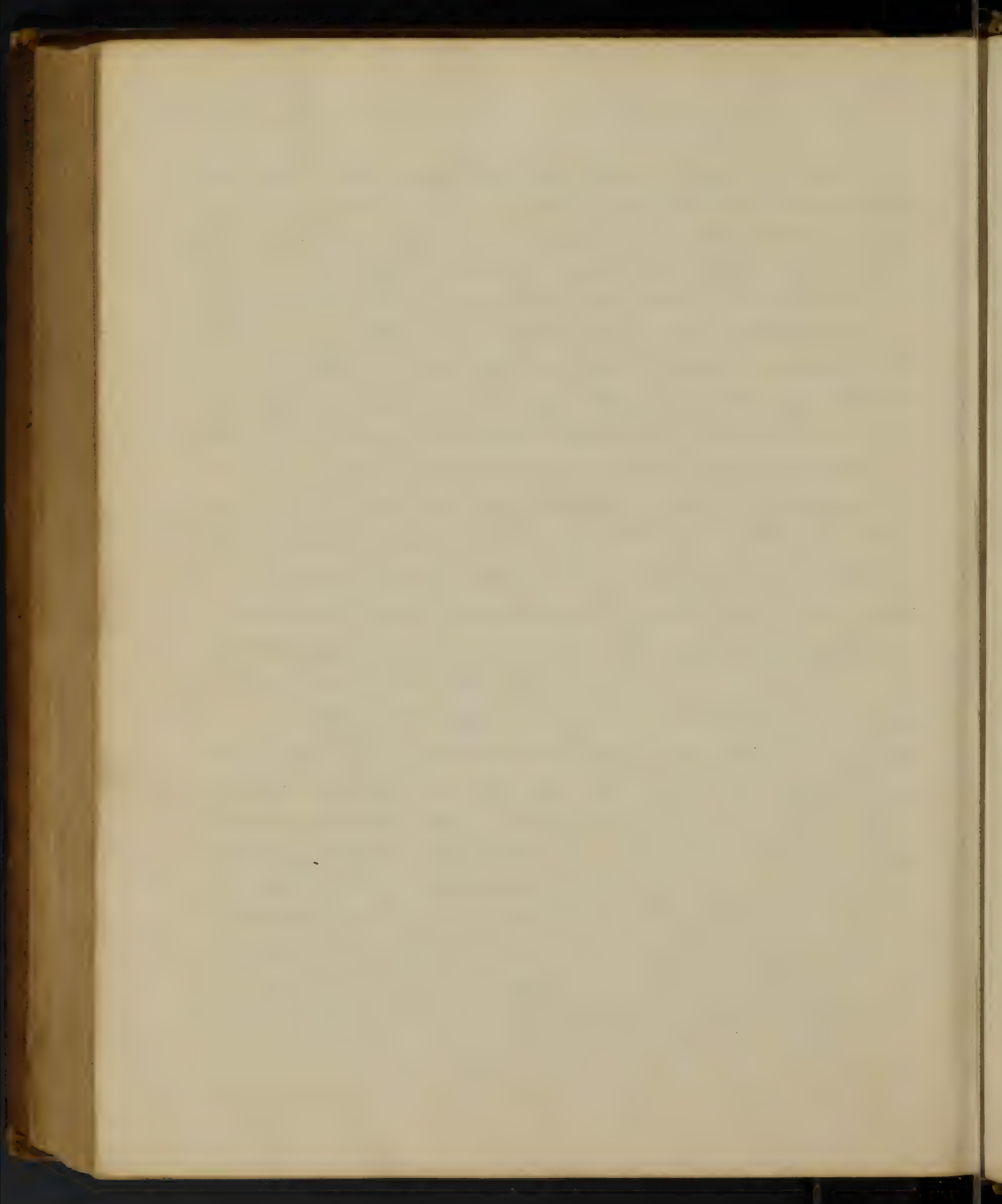
The Qu. as to whether you may insure the Life of a person without having an interest, is the same as the Qu. about wagering policies. My own opinion is, that such an insurance is void by L. M. & without any Statute. In Eng^d they have a Stat. wth all insurances on Lives, & it is also forbidden in most other Countries. There is a common warranty entered into on the part of the insured that he is of such an age. This is like any other warranty, if it is not true, it vitiates the policy. Another warranty is that they have no disorder tending to shorten Life, i.e. it is a warranty of good health. Under this warranty there have been some cases. A man had an infirmity, & there was a warranty of good health. But it was proved by Physicians, that it was not one which tended to shorten Life, the man might live as long with it, as without it. So where a man had the Gout, the physicians swore that they conceived it did not tend to shorten Life in these cases the warranty of good health was not falsified. 11 Bl. R. 312. 12 Mod. 609. In this case case it was proved that the insured was troubled with spasmodic fits & cramps, & the physicians swore

that these did not tend to shorten life. If there is no warranty the insurer takes all risk upon himself. If there is a warranty, it must be complied with. Par. 437. In case of a hypochondriac man, the physician said that such a man was as likely to live as long as any other man. These are not diseases which shorten life.

I have said they must have an interest, who has this interest? Why if I hold an estate for the life of A. I. he has an interest that A. I. shall live, & he may insure it. It has been a Qu. whether a creditor has an interest in the life of his debtor. Determined that he has. But it seems to me this will always depend upon the probability of the debtor being able to pay, as if a man is insolvent & is 80 years old & very feeble, there is only little probability of his ever being able to pay. but secus if he was young & a thrifty man.

The loss in an insurance on lives is never partial, but always total. In the policy there are inserted certain exceptions. viz. the insurance is void, if the insured commits suicide, is shot in a duel, or is executed to satisfy justice. These losses must happen within the time limited. If e.g. the insurance is for one year, & he dies after the expiration of the year, the insurer is discharged, & this tho' the cause of the death happen before the expiration of the time. There is no claim on the insurer if he died the next moment after the time specified had passed.





Insurance against Fire.

Insurance against Fire without interest was void at C.D. without the aid of Statute, & it has never been contradicted. 2 Blk 554. It is a common thing to insure at several offices. the recovery of the value of the thing insured is all that can be had.

If a person insures at several offices, there is a course of proceedings to be observed which I will mention to you. Suppose a man goes to the office of A and insures, & then to that of B, & then to that of C & insures. Now after he has got insured at A, he must give notice to the second office (B) of the prior insurance (by A) & when he goes to (C) the third office he must give notice of both the former insurances, & then the subsequent insurers are liable only for that which is not covered by the prior insurance. There is a proviso in these insurances which has made some figures, viz "that no loss happening by the act of an enemy (as by invasion or by an usurped power, shall render the Insurers liable". There is no law as to the act of an enemy, but what is meant by "usurped power"? It has been determined that it means a power so authorized as amounts to a rebellion, not a common mob, or a riot &c. Of course the famous mob in London in 1780. was not an "usurped power"; they burnt & down many houses. 2 Wils, 363.

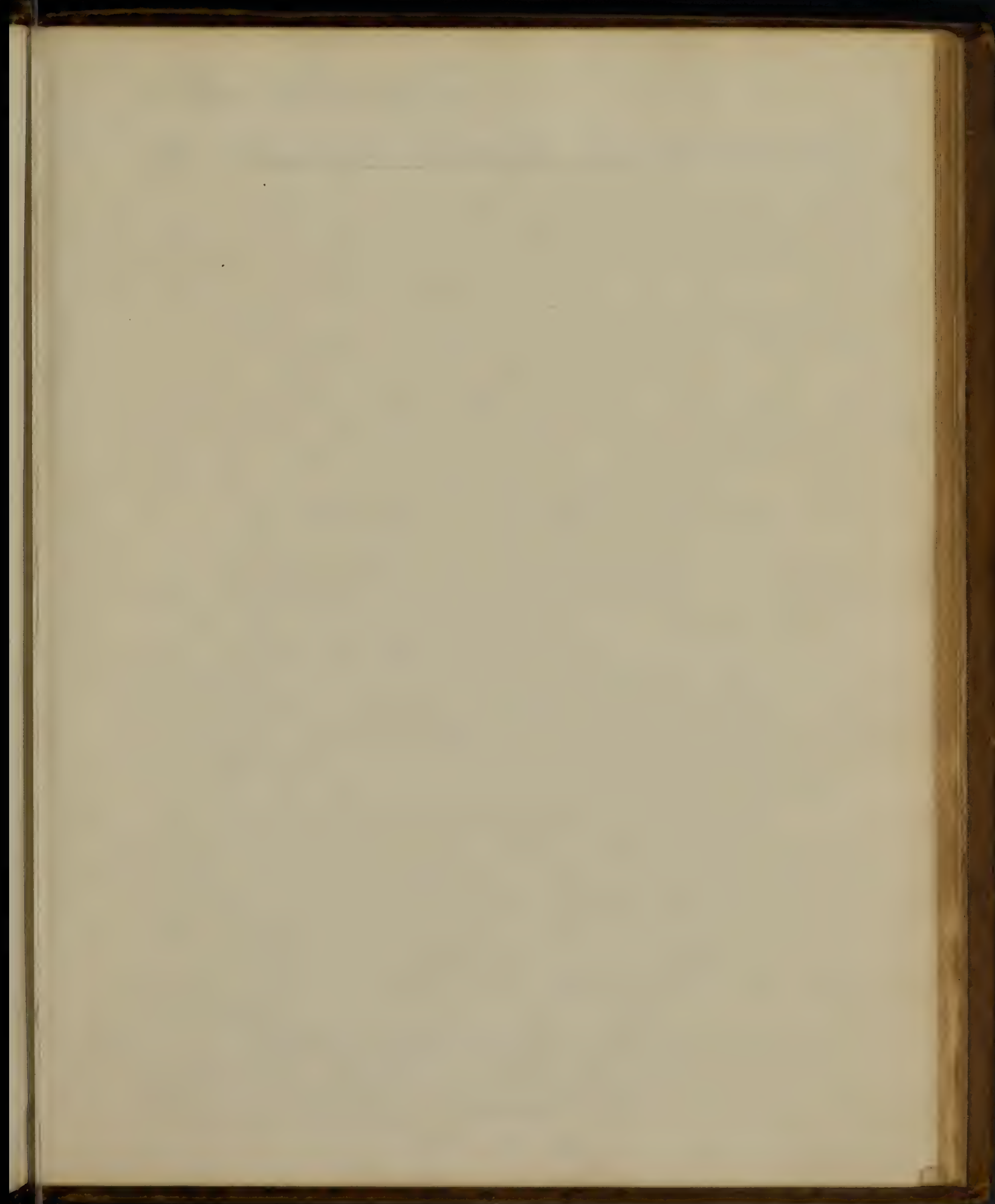
The words "Civil Commotion" were afterwards inserted, & a law has since arose as to the meaning of Civil Commotion. The Col decided that these were inserted for

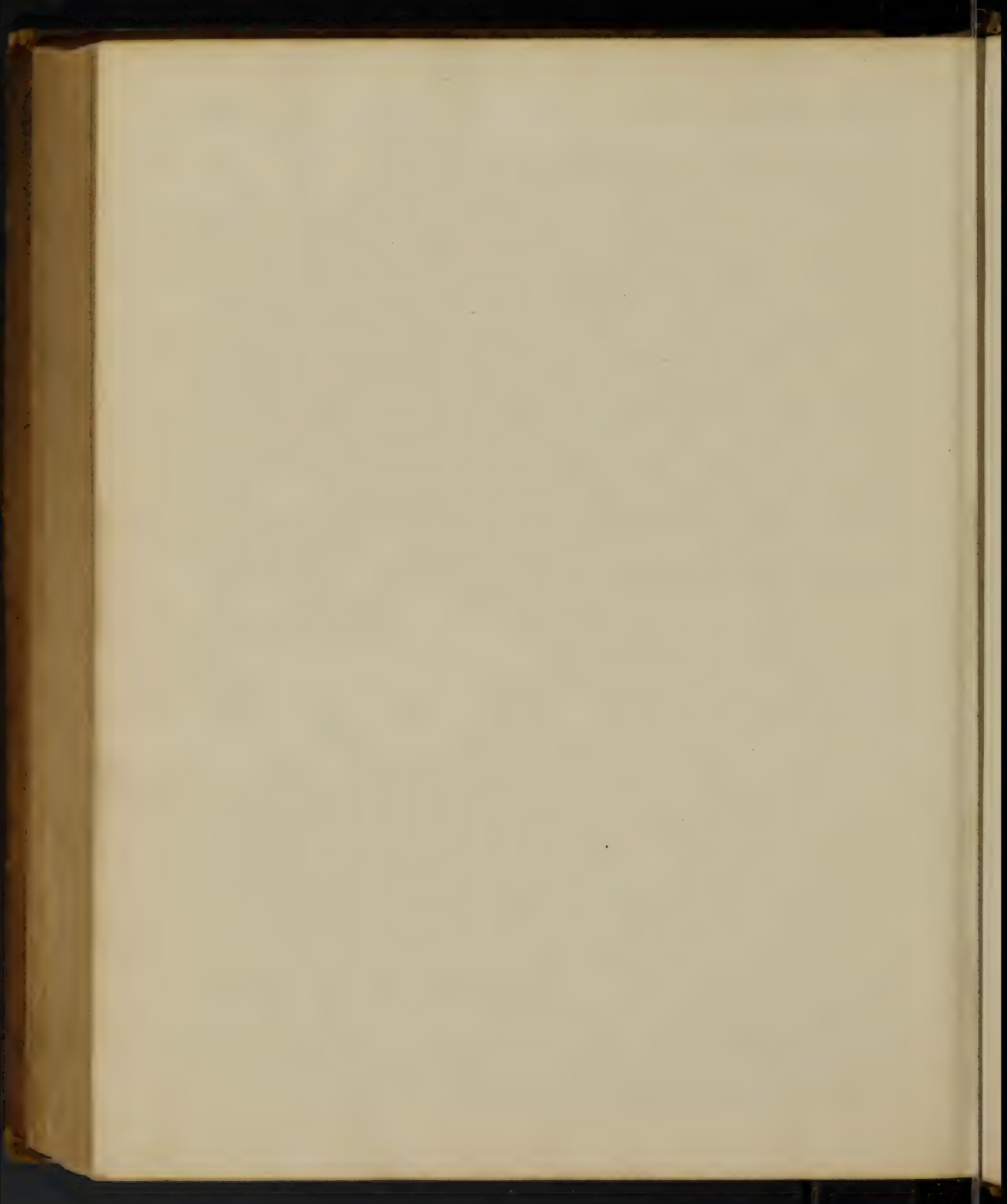
Life Insurance

Insurance vs. Life.

The purpose of discharging the insurers from all losses happening by such acts &c. & that this was the meaning. Marshall 688.

The insured must have an interest at y^e time of the insurance, & also at the time of the loss. This insurance is a personal contract & cannot be assigned over, unless this is provided for in the policy. In Conn. & N. York there is generally a provision inserted, authorizing the assignment. I presume this is the case in most of the States if not in all. Where there is this provision the insured may sell the property. There is generally an other proviso that the insured shall give the Insurer immediate notice of the loss by Fire. 3 Bro. Parl. Cas. 497. 2 Atk 354.





Six. Mercatoria.

Of Charter Parties. Sect^r 18th. April 13th 1813.

There are two kinds of these Charter Parties. One is where a merchant agrees with the owner of a Ship or the Master of her to carry goods for him from one place to another, or from A. to B. and as the case may be, to bring goods back. This person is said to charter the Vessel. It is different from freighting a vessel, for this is generally done by a number of individuals who join in freighting her. But here a person wishes to hire the Vessel of the owner & the Master continues the same use of her.

The other kind is where they hire the vessel of the owner, without paying any regard to his master. They employ & appoint their own master. The former kind is the most common in Eng^d. & the latter in the U. S. as I have understood. The Charter party is a contract entered into in writing & is sealed & therefore the action is always "Covenant". It is a contract or agreement entered into by A with B, if owner, or with C, B's Captain, for the Vessel & he is to pay so much in gross for the voyage, or so much per month, or the most usual mode is to pay so much per ton. Sometimes they are to pay so much for the outward bound voyage & so much for the inward bound voyage. Sometimes for the voyage which includes both the outward bound & inward bound voyage. This is the contract entered into.

Suppose A goes & charters the vessel the same as he would a carriage or hack stage then he takes it on to his own custody, appoints his own Captain, and transacts his own business. This is one kind. The other is

Lex Mercatoria. (Of Charter Parties.)

A ship or chartered ship is lost, & is furnished every thing necessary, & appoints the captain. What is peculiar in this species of contract is, that if the vessel is lost before she reaches her port of delivery, the contract or charter party is at an end, i.e. provides for outward bound voyage is mentioned. If she is chartered, so much for the outward bound, & so much for the inward bound voyage, & she reaches her port of delivery, & is lost on the inward bound voyage the owner will receive the hire for the outward bound voyage, but not for the inward bound voyage. If she is chartered for both outward & inward bound voyage, & is lost the freighters pay nothing at all. The whole then is this. you charter a vessel for your voyage say to the West Indies & back. no matter when it is lost for if she be only lost the freighters have nothing to pay. But if she is chartered so much for the outward & so much for the inward bound voyage, & she is lost on the inward bound voyage the owners receive pay only for the outward bound voyage. 2 Vent 212.

Suppose a ship is chartered for the voyage on which is the same in this case. Suppose she is chartered so much for the outward bound & so much for the inward bound voyage. She performs the voyage & delivers her cargo, & brings nothing back. you charter, or so much for the outward bound & so much for the inward bound. now is the owner to lose all the money he would have received, if she had not a load back? This depends upon this. Was it the fault or misfortune of the captain or his agent or factor in the voyage? Or that he had not a load ready in time? for the

Let. H. 11. 11. 11.

of Charter Parties.

and is not to wait an unreasonable time for a cargo. If the time for waiting is not agreed upon, he must wait a reasonable time according to the circumstances, but the time is generally fixed. If then it was thro his or his agents fault that he could not get on board, he will be compelled to pay as much as if he had got back a cargo, tho the owner run no risk, had nothing to lose as there was nothing on board coming back. But if it was thro some fault in the master that no load was got back, the freighter pays nothing for this inward bound voyage, & the master by his misconduct makes himself liable to the owner. (Are we the owners liable to the freighter? 78.)

Suppose the master has so conducted with the ship that it is not safe to put a cargo on board the case is the same. he is liable to the owners, but the freighter pay nothing. The fault of the master is the same as it respects the freighter, as it comes in this by the owner, for the owner appoints the master. Suppose the master acts imprudently, as if he were carelessly sailing in a storm, or goes up into a steeple or other dangerous place without a pilot, & a loss happens, the owner of the ship & master are both liable. the master is the owners agent. Sec. 246.

I have hitherto been speaking of cases of a total loss. But what is to be done in cases of detention? the voyage is to the West Indies. She is compelled to put into a port to repair, & is so long detained that the voyage is entirely frustrated. In such case the master

Lex Mercatoria.

Of Charter Parties.

The Ship has always a right to procure the property carried in another vessel to the port of delivery. This is in case the goods ~~are~~ are not materially injured but can be transported, & the vessel is so much injured that she cannot proceed. But suppose the goods are also very much damaged, what is to be done? The righters have a right to abandon the goods to the owner of the vessel & pay no freight. But suppose they do not wish to abandon, & the goods are damaged & they procure another vessel to carry on the goods in this case the owner of the ship is discharged, & the righters will be obliged to pay according to the distance they have gone, as if the distance was 500 miles and the sum agreed upon was \$800, & they had proceeded 300 miles before the loss happened they have 300 to pay, if they do not abandon but take the rest of the voyage on themselves. But if the freighters abandon they have nothing to pay. If the owners agree to transport them the rest of the way, the act of the master binds them. If the master has to pay more freight for the second ship, still the freighters have to pay no more than they first contracted for. It is just the same as if I hire a man to carry goods for me to New Haven, & he breaks down his waggon on the way. I was to pay him \$20 to deliver the goods at N. H. while he is looking at his broken waggon, & wiping off the tears and are falling in torrents from his eyes on seeing the ruin of his ancient & honorable piece of furniture, which has been the family vehicle for more than three score years.

Law Materials.

Charter Parties.

John Sales his excellent friend & neighbour comes along & agrees to carry the goods for him for \$25. Now he cannot compel me to pay this extra sum for his misfortune. But if the freighter is willing to act as in such case he is not obliged to pay a farthing [if the cargo is partial they must pay something because something is saved, but if it is total & partial & below the value of the freight, they have nothing at all to pay]. Bore 388. 389.

We also use sometimes freighted or hired in this manner & there is no written contract entered into. tho it is usual to put it into writing. ^{transcribe} But the Law does not require it, & it is good by parole, the like other parole contracts it is may become uncertain, as by the death of witnesses &c. There is this peculiarity in the L. of M. when a contract is entered into between the parties in this way, there is always a certain sum of money paid which is called "earnest" - after this it is optional with the hirer to go on with the contract or not. if he does not go on with it, the earnest is forfeited - and the merchant i.e. the owner may also decide at any time before the hirer has commenced getting loading &c. But what is he to pay in case he decides? They tell you he has got to pay "double earnest" this is inaccurate & expressive, it means that he has got to pay back the earnest money & as much more to y^e hirer. In this way either party may decide. [Hence he put an e.g. as Suppose the hirer pays 100\$ earnest & decides, he loses it all, & if y^e owner decides he loses the 200\$ i.e. 200\$ more]. Bore 389. 390. 391. This is a singularity, i.e. that a man should be at liberty to decide wth he enters into a lawful contract & y^e whether y^e other would or not.

Lex Mercatoria.

Of Charter Parties.

An action ⁱⁿ lies ^{as} ^{well} ^{here} for a breach of ^{it} ^{as} ^{at} ^{law}. But it is different. here it is regulated by S. M. he may recede by pay^{ing} ^{it} ^{as} ^{supra}. Now when an injury happens to freighter thro the misconduct or fault of the master, he is always liable. But when the injury happens by inevitable accident, or without ^{any} fault of ^{the} ^{master}, neither ^{the} ^{master} nor the owners are liable. Hence this because they do not stand at all on the same footing with Common carriers. Packet boats along the Coast are liable the same as Com. Carriers by Land, & these are liable for every loss except it is occasioned by the act of ^{the} ^{God} or open enemies or by the act of the British himself.

No special contract entered into between the masters & owner, as to who shall have the freight can affect ^{the} ^{freighters}. He will have ^{the} ^{same} ^{remedy} ^{as} ^{the} ^{owner}, as he ^{as} ^{supra} had not that contract been entered into. Sometimes the contract is made with the owner & not with the master, but this does not subject ^{the} ^{owner} any more than if the contract is made with the master - a contract entered into with ^{the} ^{master} is a contract entered into with ^{the} ^{owner}. The contract may be entered into with the master in a distant part of the world, yet the owners are as liable upon it as if it had been made with them. But if the contract is made with the owners they alone are responsible to the freighters. The master may ruin the prop^{erty} by his misconduct - but the freighter looks only to the owners with whom he made the contract. But still the master is liable to the owners. If the contract is made with ^{the} ^{master} the freighter may look to both - & both are liable. This is different from C. L. for if a man at C. L. enters into a contract with an atty. the latter is not liable, unless he is authorized to make himself so. But since by S. M. it is ^{supra} the freighter here gets a double security. But since if the contract

Lex Mercatoria.

of Charter Parties.

is made with the owner. In case of charter is hired & the owners have nothing to do with it. If appointment of the master, the Law remains the same, except that the owners are not liable for any act of the master, for the master is now the agent of the hirers. In all other respects the Law is the same. There have been some cases, this is one, where a Ship is out at sea, & a loss happens by accident we know

and it is said if a loss happens when they are in Port they are governed by the same Law as common carriers & subjects as this would be. And not believe that the modern cases warrant this. They are governed by the C. L. but not by the Law governing common carriers, for they were not common carriers. Suppose it arose from their being within the body of the County but they did not carry as common carriers did. The carrying was at Sea. It is however not well settled. 1 Vent 140. 238. 1 Mod 55. 2 Rev. 69. 2 Term 7918.

The mercantile Law gives to all masters of vessels who abroad the power to contract for necessaries, & to bind the owners. This is a power given by Law. Of course no power of attorney is necessary. The master may contract for provisions or for repairs &c. It is not a defence for the owners to say, we gave him no authority. For by express contract we deprived him of such authority. We furnished him with money &c. This is no defence as between the owners & the person with whom he contracts. It will not discharge the owners from the contracts made by the master, tho' the master may be liable to the owners. The master may also hypothecate the Ship, & the person of the master, as well as the Ship is liable to the owners, & besides these the persons of the owners are also liable. And this liability in D. C. goes to great extent, for it is impossible for the owner to get clear of it. Suppose the Case was this, a ship was 10 years to F. & S. F. & S. has the whole power

Lex Mercatoria.

Of Charter Parties.

control over her for that time. Even if within that time it becomes necessary to furnish the Ship with tackle &c. or any repairs &c. and a merchant in a Foreign country &c. furnishes these necessaries the owner (T.D.) is liable on the contract with the merchant so made by T.D. the master altho the owner (T.D.) has no interest in the voyage or freight. This is not at all agreeable to v.d. principles. But this is not all. for suppose the master is not the freighting Captain, the owners are liable. The owners are liable so long as the freighter does not appoint the Capt. and this is for the purpose of facilitating commerce. for by these means the Capt. can obtain supplies &c. in a foreign country by pledging the Ship to those who furnish them - But the person lending money &c. cannot however hold the Ship tho pledged - for the object of the master in pledging is to put her in a situation to go where his business calls him. But as C.D. the pledge is always retained as security. If A pledges his horse for the payment of 100£ to B. now B. can hold the horse till the money is paid. But it is different where the Ship is pledged, for the very idea of the contract is, that the Ship is to proceed on her voyage. But after the voyage is performed, you may ^{seize} ~~retain~~ the Ship on any part of the civilized world, & hold her till the money is paid. (Harder 376. 2 Vern 443. 643. Cowp 636. 10 T.R 73. 105. 1 H. Bl. 119. Hardw. 603. 195. 376. Com. Di. tit. D. l. 2. 230. 13 vol. I believe.)

Six. Mercatoria.

Of the Law as to Joint Promises to Sell. Sect. 17. § 2. 14.

I do not here enter upon the whole subject, because it is in a great measure governed by the C.D. which is treated of in other places. I only in this place wish to point out the S. Ma. as it differs from the C.D.

Suppose a number of persons own a Ship. She is about to go on a voyage. in they differ as to what voyage she shall go. now what is to be done? The rule is that the majority or interest direct the voyage - they direct its course & destination. But the majority never can compel the minority to assist in fitting out ^{for} the voyage. The majority can do this without the consent of the minority, but they must all be notified, and all be present, unless indeed they wilfully absent themselves is, they must be notified so that they may be present if they please. when the vote is taken if the majority say she is to go such a voyage as to India, she is to go there - but what are the minority to do? They may think it a dangerous voyage, & they cannot be compelled to join. Suppose the majority fit out the voyage & nothing more is done, & the voyage turns out to be a profitable one - now the minority may come on & have a share of the profits according to their interest, but in such case they make themselves liable for & must pay their share of the expenses of the voyage &c. But something more may be done the majority may prevent this & have all the profits to themselves by going into an Admiralty Court, & giving sufficient bonds that if any loss takes place they will pay the minority their full share of their interest. after doing this if she makes

Lex Mercatoria.

profitable voyage, the majority are entitled to the whole of the profits, & if she is lost the majority must pay the minority their share according to their interest in the Ship. Quith 26. N. May 2235. 2 vers 643.

Suppose the majority have decided the voyage, have done nothing more, but leave the minority to take their share of the prize, now if the minority do not approve of this, they may go into a C. of Admiralty & can put the majority to give sufficient bond out steps &c. And then the result is the same as in the above case. They receive no share of the profits, if the vessel is lost they are to be paid, as above. Quith 26. N. May 2235. 1. 55. Hardr. 473. 6. 169.

There is but one case more. Suppose the majority send out the vessel without the consent of the minority, & no bond is entered into as above, & the ship is lost, do the minority lose their share? Certainly, for if she had made a profitable voyage they would have taken their share, & it is their own fault that they did not secure themselves by going to a C. of Admiralty. They must then bear the loss. Noley 221. 1 vers 297.

Suppose the joint owners agree to send & there is no difference between us to the voyage. They have different interests. Now when the vessel comes to be sold a majority of owners governs not a majority of interest as in the former case. 1 vers 665.

Les Mercatoria.

Of the Law of Partnership in Trade of every kind.

Men are always Partners in Trade & liable as such, when they are to share jointly in the profits & loss. one may carry on the business & be the ostensible trader, & have several dormant partners, yet still if they share in the profits & losses they are partners, & liable to be sued as such, & may sue as partners. If a man for the purpose of giving credit to his neighbor suffers his name to be used & shown out to the world as a partner, he is liable as such even tho he is not to share in profit or loss. For were it not so the Creditors would be defrauded by this imposition, for they trust in good faith that a partnership of this kind existed. 3 P. Wms 402. 1 W. Bl. 37. 2^d part of Hobbs 247. 2 W. Bl. 498.

Now by the principles of C.D. whenever persons are joint owners of property, acquiring it by the same right & title they are joint tenants, & the *ius accrescendi* prevails (there is explained the meaning of *ius accrescendi*). But this is not the case in D.C. By D.C. they are owners in common. If A & B. are partners & trading in C.D. A dies his share of the property vests in his exor. But at C.D. if A & B. own a house jointly & A dies, B is the entire owner. So if they own a farm jointly, the right of survivorship takes place. In Con. we know nothing of the *ius accrescendi*. we never adopted that rule. & in many of the States it is prevented by Statutes. In N.Y. they have a Stat. saying thus far, viz. that there shall be no *ius accrescendi* unless it is manifest from the conveyance that it was intended to survive to a survivor. But

Sir Alexander.

Partnership in Trade.

in S. A. it does not exist. Suppose A. & B. have \$2000 each in Trade, there are no debts & A dies. Now C. & D. is to receive \$1000 & B the other 1000. But if there is any thing in action, as debts to be collected, they must be collected by the surviving partner. You cannot join him and the Execr. in a suit together. For the Execr. can not be a partner? in the same way as the survivor. The right to sue and the liability of being ^{sued} is altogether in the survivor. But this has nothing to do with the right of property. He is only to save the process of procuring. The surviving partner must account with the Execr. for what he collects. He must pay him his moiety of the testator's property. So the surviving partner is to be paid & paid at goes on him (i.e. for Partnership debts). But he has a right to retain out of the partnership effects a moiety of the sum so collected out of him. If the survivor will not sue, Chy. can compel him. 1 Salk 444. 3 T. R. 433. 1 Show 183. 188.

It may be that the Execr. has got most of the property into his hands. If so, he must account with the surviving partner. In no other case, except this, two of suing & being sued, has the Execr. less power & control over the property than the surviving partner. He can not sue nor be sued, & those are all the rights of which he, as Execr., is deprived. If a debtor comes & pays the Execr. a debt, he may give a receipt or discharge, & it is good. He must then account with the surviving partner. So if the property is taken away & there is a right of recaption, it exists as well in the survivor as in the surviving partner. In short every right & duty

Six: Mercatorix. 1st Partnership in Trade.

the two above exists in the Exec: as much as in the surviving partner. It has been contended that the survivor has the absolute control over the property. But this cannot be. For to give him the absolute control over it, would be near in the same as saying he has the absolute property, & the authorizing will not warrant this. The surviving partner may be a bankrupt in his private concerns, Com. 474.

The true rule seems to be this that an undivided moiety exists in the Exec: but so much of the joint property as his co-partner must be collected by the surviving partner. Suppose a creditor of the firm sues the survivor, & gets judgment vs him, & can find no property on which to levy the execution, & the survivor (D.) is a bankrupt in his private capacity - perhaps the Exec: C. has property. Is it any rate his estate? If the deceased Partner was abundantly able to pay - must it not be paid? Certainly. If the suit vs D. becomes ineffectual, i.e. cannot be collected then the Exec: may be sued. The mode in Eng. is by an application to Ch. C. But in Cox we have found no difficulty in bringing the suit at Law. Where there have no Ch. Courts, they must sue at Law. In the suit vs C. the Exec:, it appears on the declaration that there has been an insufficiency. Suit lost vs D. the surviving partner & that gives a right of action vs him, the Executor &c.

I will make a few observations as to the right the Creditors have vs the Partnership & vs the members in their private capacities in case of Bankruptcy of the Firm. Suppose it is a B. in partnership - now as long as there is no bankruptcy or insolvency of the property of

L. & M. Mercantile.

all liable for debts. If in his private capacity owns
B. a certain sum, & the firm of A & B own C a certain
sum. & B. in his private capacity owns D a certain
sum. Now as long as there is no bankruptcy or in-
solventcy, any of these creditors may sue & take their
debt out of the private property of the firm. Both
the individual & Company property is liable for
the payment of debts. All the property the partners
have whether it is private or Co property is liable for
debts, so long as there is no bankruptcy. But in case
of bankruptcy or insolventcy it is different, as you
will presently see. L. & M. 100.

The Partners in Trade become bankrupt
or Insolvent under a Law of the State. Their proper-
ty is taken from them & vested in assignees to settle
accounts, pay the debts &c. How? The rule is, the
joint or Co. property goes to pay the Co. debts. you have
now got to make the creditors all distinct. The
private property of the partners goes to pay their
respective private debts. This is the first thing to
be done. Now suppose the Co. debts amount to \$1,000
& the assets of the Co. are but \$250 you apply this
250 to y^e payt. of the Co. debts, & it pays but 5 in the pound.
The next thing is to look into the situation of the
private property - you find he owns \$1,000, & his pri-
vate property is \$1250 you then pay off his private
debts & there is 250 remaining. Then you take & pay
the Co. debts for the rule is that after having paid
the private debts with the private property the

Lex Mercatoria.

Partnership in Trade.

Surplus is to be taken to pay the Co. debts. now this \$250 of A will pay 5% more on the pound. it was not a Bankrupt in his private capacity. the Creditors of the firm have now got 10% on the pound. You find that B. had private debts to the amount of \$1,000 & had property to the amount of \$1250. You treat it just as you did A's so that the Creditors of the Co. have now got 15% on the pound. But further, each partner is not bound for the private debts of the other. Both parties are liable for the Co. debts, but the Co. are not liable for the private debts of the partners. When the Co. debts are paid then each one's share is liable for his own private debts. Suppose there is a surplus of Co. property & a deficiency of private property. e.g. A & B as partners really owe but \$1,000 & the Co. property amounts to \$1500 - now the Co. debts are to be paid off in the first place & then you have 500\$ left - what is to be done with it? Why you divide it between A & B. which gives each 250\$. A owes private debts to the amount of \$2,000 & has only 1000\$ so that he is a bankrupt in his private capacity, but he receives 250\$ from the Co. propy. & this must be also applied to pay his private debts which will enable him to pay 1250\$ out of the 2000\$. this is 12 1/2% on the pound. Now B. only owes 500\$, & is worth \$10,000, he pays all his own debts, but his property is not liable for A's private debts. The Co. was not bankrupt. This Law applies only, where the Co. is insolvent. Nov 360. 2d ed 272. 1st ed 173. L. Ray 871.

Sec. 11. *Merchandise.*

Partnership in Trade.

How are we to get along when we buy the joint property is liable for the private debts? it certainly is liable. But how are you to get along when you have the execution on it? There is some difficulty attending every mode I have ever yet seen. In Eng. there are three methods. one is this. A & B. are joint owners, e.g. of a *Wh. of Flour*. A & B. send to the *Exon.* as *levied on this H. of Flour* for the debt. Can you sell B's property for A's debt? it is not fair - but still A must pay his debt & if he has no private property the property of the firm is answerable. Well can you draw off 1/2 of this run & carry upon it? this is frequently done - But who gave you authority to do this & thereby dissolve the partnership. Another mode is to levy upon the *Wh. of Flour* & sell one moiety, as it stands there & then B. & the vendor are joint owners of it. But there is a difficulty in this. For many persons will object to purchase if they are to become a partner with B. in this run - who is a stranger to them. He will not sell for its real value. Another method is this. Suppose the debt of A. is small, one barrel of flour will pay it. The officer goes into the *flour* & levies on two barrels of flour. sells one & delivers the other to B. Another method is to sell both & give B. one half of the amount. But B. is not a Bankrupt & he does not wish to have his property sold at the *Wh. of Flour* for very frequently it will not bring one half its value. There are the objections to this last method, but still it is frequently done; & indeed exceptions may be taken to either of the modes. Some say this last mode is the best, but

Lex Mercatoria.

Of Partnership in Trade.

it is evident that injustice will often be done to B. and moreover you have no authority to separate the partnership. B. is the owner of one half, & what right have you to sell his property. Add also the first method mentioned there are objections to that. Suppose a case where a whole cargo was sold, & it did not bring near so much as it would, provided the sale had not made the owner & B. owners together. I however think the better mode is to carry on the property, & sell one moiety. you have a right to sell a moiety, & if it will not sell for as much as it is worth, it is the owner's misfortune. None of these methods practiced can be, in my opinion, sustained in point of law, except this method of selling a moiety. But in this case there is no violation of principles, & the only objection to it is, that the property will not sell for its value. But in all the other cases, you are taking the property of B. who owns nothing & selling it at the price you have on principle no right to do this. They may have devised of some better methods in some of the States, but I do not know of them.

There has been an attempt made to break in upon the principles of liability in the partnership. To explain what I would. Suppose A & B. carry on business at different houses without any apparent connection. At one house the business is carried on in the name of A. & at the other in the name of B. No one supposes they are Partners, but they agree to share the profits. The law has now settled the law, that each one is liable for

Lex Mercatoria. of Partnership in Trade.

the losses, as it respects third persons. and this, even tho' there is an express stipulation that they will not share the losses, but only the profits. It was contended that this was not a partnership, but it is settled that it is so far as respects Creditors doing. 10 John 371. 1 P. W. 602. 2 K. B. 247.

It is settled that in case of death of one partner, his Exec. & the surviving partner must account with each other. But they are not to account on the principles of indebtedness & surpluse. Suppose the survivor has more than his share, can you sue him, or an act. on your money had & received? no you cannot unless the account has been settled & a balance struck, you must sue in an action of account or apply to Chy. This is the only way you can proceed while it is a claim of property the sum not liquidated, nor the balance struck. Suppose one of several partners should contract in his own name, & as for himself. now if you can show that the property went into the Firm you may sue the firm & they are liable because it is a partnership contract. this is the principle. 4 T. B. 705. 727. 1 H. B. 45.

There is some difficulty attending this subject, i.e. as to ascertaining when the partnership or firm are liable. One partner contracts & gives the name of the Firm as security. now the Q. is, are they liable? one thing is clear, that, when the security of a firm is given for that which is clearly without the scope of the partnership or firm, the firm is not liable. now merchants & Co. (as such) have nothing to do with it. Suppose A. goes & purchases blackacre & gives notes

Lex Mercatoria. Of Partnership in Trade.

for it in the name of the Firm, are the firm liable? No - for it is evidently without the scope of their partnership, & therefore the firm are not liable unless it was bought for the firm or came to the use of the firm. In this latter case the firm is liable, for it now becomes a partnership contract. But this must be provided for the presumption is, it is not for the use of the firm. But for contracts within the scope of their partnership as merchants, they are liable, even tho the contract does not come to the use of the firm. As suppose A goes out & buys butter cheese &c., and gives the Co. notes & then converts this property to his private use - the firm is doubtless liable. But if A goes & purchases an article not within the scope of their trade, as e.g. a coach, & gives a partnership security for it - it may be that it goes to the use of the firm - if so they are liable - if not, they are not liable.

Sect. 20th. April 15th 1812.

The contract made with one of the partners with the rest, is within the scope of the business of the firm, (indistinctly firm). The partner has also the same ^{power} to rescind a contract as to make it. He may give a discharge or a partnership account, & it is binding on the firm. And even if the partnership is dissolved, if any partner contracts in the name of the firm, it binds the firm, unless notice has been given of the dissolution. All the difficulty is in ascertaining what is notice. The dissolution must be known and it is presumed that it is known, where a general notice has been given according to law. Where it is a matter of

Lex Mercatoria.

Partnership in Trade.

notoriety that the partnership is dissolved all are supposed to know it. The mode of notice is disregarded. The usual way of giving notice in country towns is to set up hand bills or to publish it in the newspapers. In cities, notice is frequently set up at the coffee houses as well as published in newspapers. And yet after this has been done, there may be persons who are really ignorant of the dissolution & may enter into contracts under the idea that the firm is bound. You must then, however, this may be rest on the presumption of law, which cannot be rebutted, that all persons do ^{know} it, when the notice has been published far & wide in the ordinary way, as the Law requires. I know a case where notice was published in a newspaper, & the person claiming he had not received the paper weekly in which the advertisement was inserted. Now it is possible he never saw the notice of dissolution, but the presumption is he did know it.

Suppose A & B are Partners - now it is a very common thing on a dissolution of partnership, for A to take all the property into his hands, & agree to pay all the debts & that B shall be discharged from his liability. Now this contract with B. has no effect on third persons. Both remain liable for the Co. debts. 1 Bulst 292. 13 C. 16. 993. Cowp 439.

Property, which is not the subject of mercantile concerns, as when conveyed to the firm by that name, use of a conveyance to J. B. & Co. will not be the title in J. B. alone. The individuals composing the firm must be named. It is not the subject of mercantile transactions. If a conveyance however is so made, J. B. may be compelled as to convey to J. B. use. If it is conveyed to the individuals as J. B. & Co. it takes the course of J. B. & Co. & will be divided to them heirs.

Law. Mercatoria

Of Factors.

By the term factor I here mean a man employed by a Merchant in one country to transact business in another. This factor acts under a commission. And whatever the commission is, he must strictly adhere to its terms, & if he does not but transgresses to the injury of his principal, he is liable. As e.g. Suppose his authority is to sell goods at such a price only, & he sells at a different one, now he is liable to the principal; but the principal cannot say the sale is not good because the factor has gone contrary to his commission & acted without authority; for here a different principle steps in & governs. The principal has employed the factor the purchaser has a right to presume he has authority to sell, that he will not exceed his authority, and the purchaser cannot inquire into the extent of his commission. The contracts therefore that the factor makes with third persons is good.

These commissions are General or Special. The words of a general Commission are very technical. They are these - "to buy, sell, & conduct with as his own." Sometimes the words "conduct with" are not inserted. Such a commission then vests the factor with discretionary power to buy & sell as he pleases. But is he never liable? Yes, he is liable to the principal, if he has so acted that you can draw the inference, that no man of ordinary prudence would have so conducted with his own. as if he sells in the price no man of ordinary prudence would do this. The factor may be called to an account for his mismanagement.

Six Mercurior.

Factors.

misconduct & neglect. But under this general commission, the principal cannot complain, tho the factor sells a little lower than the real value. *Yelv 202.*

A Special Commission is to "sell & dispose", no words are inserted "to manage with it as his own". Under this commission, the factor is not at liberty to sell on credit, & so it has always been understood in the mercantile Law. If it is a general commission "to sell &c. as his own", he may sell on credit. But if it is a special commission, & he sells & gives credit, he runs the risk himself. & the principal may call on him for the money, the moment the goods are sold. The principle is, he must receive a *quid pro quo* at the time he sells. *Molloy 493. 2 Mod 100. 2 Vern 638. 10 Mod 144.*

(When the principal wishes to bring the factor to a settlement, the ancient remedy in Eng^d was to sue him in an action of "account". But it has now gone out of use. They now, in mercantile transactions, apply to Chancery, for Chancery have more power to call for papers &c. and I believe it is generally the custom through out the U. S. where they have Cts. of Chy. to apply to them. In Conn. the we have a Ct. of Chy. yet our custom is to sue in an action of account. It is said you cannot go to Chy. in Conn. because our action of account is so framed, as to give an adequate remedy at Law. Our action of account differs from the Eng^d. But I do not believe but that an application may be made to Chancery in Conn. To be sure, it is a rule, that you cannot go to Chy. where an adequate remedy may be had at Law.

Lex Mercatoria.

Of Factors.

but I believe a Bill in Chancery may be filed in Conn. for the Auditors have not as much power to call for papers &c. as a Ct. of Chancery. Hence filed a bill myself, because I wished to have some evidence, which I could not have introduced before the Auditors, & no objection was made. In some of the States the action of account is very broad & extensive, & it must be so where they have no Chancery.

It is a common thing for one gentleman in a foreign country to act as a factor for several houses, or firms who are strangers to each other. Now, altho they are strangers, they have sometimes to run a joint risk - as suppose he is factor for A. B. C. D. & E. and each of them have sent him so much broad cloth, & the factor makes a joint sale of it to one man. This commission allowed him to sell on credit - the vendee paid one half down & was to pay the residue in 6 months, but before the end of the 6 mos the vendee fails, now this is a joint loss & the merchants must each bear an equal share of it. If the factor had no authority to sell on credit, he is in such to liable himself for the whole amount. So that if the factor becomes bankrupt, there must be an equal dividend among the merchants. And one cannot secure to himself his whole debt by superior diligence as he may at C. D. This is a mercantile idea altogether. For C. D. knows nothing of dividing the risk & loss in this way, for at C. D. one creditor may secure his whole debt by taking all the property, & not leave a cent for other creditors. He is allowed to prefer himself to his neighbor. Now it is a principle of Mercantile Law, which runs through

Lex Mercatoria.

Of Factors.

mercantile transactions that losses shall be as equal
as possible.

This Qu. has arisen. The factor is employed by
three or four different merchants. He draws a bill of Exchange
upon them - presentment is made to one, & he accepts it,
& it turns out that there is a loss. Now the Qu. is, does
the acceptance of one bind the rest? In a Cal. decision
the Ct. held that the others were not bound. The acceptance
of one cannot bind the rest unless they are in partner-
ship, which was not the case here. There is no doubt
in my opinion of the correctness of this decision, yet
in the Report of one of the decisions the Reporter adds "sed
curiam quere." Hall 126. Lawyers Magazine.

For on the same is required of a factor as is
of other Agents viz. fidelity, diligence, & honesty. He is not
liable for inevitable accidents & he is only to use ordin-
ary diligence, & therefore he is not liable for loss by theft
if ordinary care has been taken. Co. Litt 89. for goods of
Liability. Moloy 495. 4 Co. R. 84.

So on the other hand the principal must con-
duct fairly - for if he by misconduct or fraud sub-
jects his factor - as e.g. the principal sends him goods and
represents them to be of such a kind & not damaged, and
the factor sells them without opening the bales, as undam-
aged goods, without meaning any fraud, but is deceived
by the principal's representations - now the purchaser has
a right of action vs the factor & he will be compelled to
pay the damage - but the principal is liable to the factor
for his damnification - & so is the principal liable to the

Lex Mercatoria.

Of Factors.

purchasers, if they choose to resort to him; so that the factor has a remedy on the principal, & the purchasers on the factor or principal. Bro J. 468. Poph. 143.

There has been a great deal of discussion on a particular point, which appears to me strange ones. Now the factor when employed as above to transact business in a foreign Country, may send out Ships. pay the duties & charge them to the Merchant in his account current with him. . . . Now it is not an uncommon thing for factors if they are not honest men, to smuggle the goods to avoid the revenue duties. But why should he do this? As Hobson at one time charged the duties over to the principal, this he did after smuggling them. He runs the risk of being found out - if he escapes he makes money, if caught he is liable to his principal, & in some countries punished capitally. Now it is not strange that this should be practiced but it does appear to me strange indeed, that the Court should decide that the Factor was entitled to this charge & that the Merchant could not question it. I hope never to see a decision of the kind in our Country. If the factor is entitled to recover such charges, it is setting against inducement before rogues to break the Laws of Society. If the principal is engaged in the plot, or connives at the commission of the crime, he ought on conscience to pay the factor this charge of duties, but it is in no other way binding upon him for it is an illegal contract & cannot be enforced in Law. Bro J. 265. Bac. ab. title Factor, & cases cited there.

The rule by the Factor must necessarily bind the principal, whatever the factor does with the money over of the

takes it to himself. But the factor cannot pledge goods for his own debt, if he does it would not be good in the hands of the pledgee. But in this case he must be a known factor for if he is not a known factor but appears to be the owner, the pledgee will take the property pledged. He has an authority to sell the goods, but not to pledge them. 2 Stra 778 and 1178.

A factor is very often limited in his purchases. He is allowed to buy only so much. Now if he buys more, the principal is still bound for the purchase, upon the ground that every one who trades with him, cannot read into the extent of his commission - the principal has holden him up as his agent, but it is always presumed that he will not exceed his authority. If there is a loss however, the factor is liable over to his principal for exceeding his authority. 2 Barn 638.

In one respect a factor differs from all other agents. All agents are liable for damages if they exceed their authority, but the factor if he injures his principal by exceeding his commission, must not only pay the damage, but he loses all his wages. This is a mercantile regulation entirely, for if a factor without a commission he must pay damages to his principal for the loss he has sustained, but he is still to receive his wages. In fact, in such case the contract between him and his principal is, that he shall lose all his wages. Neglect of duty by which a loss happens will make the factor as liable as if he had exceeded his authority, as if he is directed to procure an insurance and a loss happens he is liable to lose his wages. 2 Bury 339 Bosc 237.

Another important thing as to Factors is this. When a factor is publickly known as a factor, & the principal is apprehensive that he, the factor, will fail, he may notify all the debtors not to pay their debts to the factor, and then they cannot, or if they do, they may be compelled to pay them over again to the principal; and if they are obliged to pay them over to the principal after having once paid the factor, they may come on him & recover it out of the factor if he is able to pay. The contract is sometimes made in the name of the Factor, & sometimes in the name of the principal, but it makes no difference in whose name it is made. If a note is made payable to the factor he has the legal, & the principal the equitable title. you will remember that this applies only to factors publickly known if they are private agents namely, it is very different. They are then supposed to be traders for themselves. This was remarkable, the case previous to y^e American Revolution. Almost all the Merchants South of Philad^a were private factors generally Scotch men & conducted business as tho they were dealing for themselves. The principals, supposing they were obliged to pay notified the debtors to pay them y^e factors. The debtors however did pay the factors, & the Q^u was whether they ~~are~~ be compelled to pay over again to the principal? Determined they ~~are~~ not to thus compelled - the factors were not publickly known as such.

The factor has a lien upon the prop^y in his hands not only for his commission, but for the balance of accounts in his favor between him & the principal. He is not obliged to part with the prop^y till he is paid. Factors are frequently men of great prop^y & advance money for the principal, & they have a lien ~~on~~ ut supra. Bun. 489

Lex Mercatoria.

Of Factors.

The Factor is oftentimes a merchant himself, now when his own interest & that of his principal clashes, & even requires him to take better care of his principals than of his own as e.g. Suppos. he sells \$1000 worth of his principals goods, & \$1,000 worth of his own on Credit to J. S. now sometime afterwards J. S. pays \$500: this must be applied to the payment of the debt due the principal - after this he pays \$500 more - this must be applied in the same way - and if J. S. becomes insolvent & unable to pay any more, the factor is the loser. This is correct, for if the first payment went to satisfy his own debt, he might ruin the principal - he might know that J. S. ^{or} pay but \$1,000. yet says he will trust him with \$1,000 of my own & \$1,000 of my principals property, & the payment shall satisfy my debt at all events. For this reason the factor is careful to have confidence in the ability of the purchaser, when he knows the first payment is to go to satisfy his principals debt.

If the factor having property in his hands dies, or becomes bankrupt his Exec^r in one case, or Assignees in the other have nothing to do with the property of the principal. For in my take the ^{goods} immediately, & the Exec^r &c. has no authority over them. In some cases they are so mingled, that they cannot be ascertained & separated from the factors prop^y, as if the money is all thrown into one drawer, in such case it rests on the Exec^r or Assignees, & he is liable over to the principal. The result is the same (i.e. in case of death & leaves property sufficient to pay) whether the prop^y is divided immediately on the account p^r over to J^r Exec^r or Assignees. In case of bankruptcy it is often hard for the principal will now be a loser. 2 Vern 638. 1 Sa 418.

Lex Mercatoria.

Of stopping goods in transitu.

This is a right Merchants have of stopping goods after they have sold them: Now there is nothing more contrary to C. L. principles than this. If A. S. sells his horse to T. N. and T. N. takes him, & gives S. his note payable 3m^o hence, the horse will co. instant in T. N. & neither have the power of receding from the contract. & T. N.'s creditors may levy upon y^e horse immediately. After the contract is closed A. S. has no right to detain the horse, tho he finds T. N. is a rogue & a bankrupt. Now a merchant sells goods to another & the vendee becomes bankrupt or is bankrupt. now if there was no right of stopping the goods in transitu the vendee w. have to put up with a dividend. but there is a principle which is a creature of Lex Merc^a. providing that y^e goods may be stopped in transitu. & this may be done tho the goods have been delivered to the vendee. as e. g. suppose y^e goods are taken down from the shelves, marked off, packed up, & charged in the Book to the vendee. now at C. L. these goods are sold, & the contract is at an end. But by the L. M. the vendor finding that the vendee is a bankrupt, may stop the goods in transitu, & not let them go out of the Store. Again suppose the goods are delivered to the vendee & are to be carried to a certain place, & are carried out of the Store, still the vendor may stop them in transitu, the same as if they had been stolen. The right exists as much in the latter as in the former case.

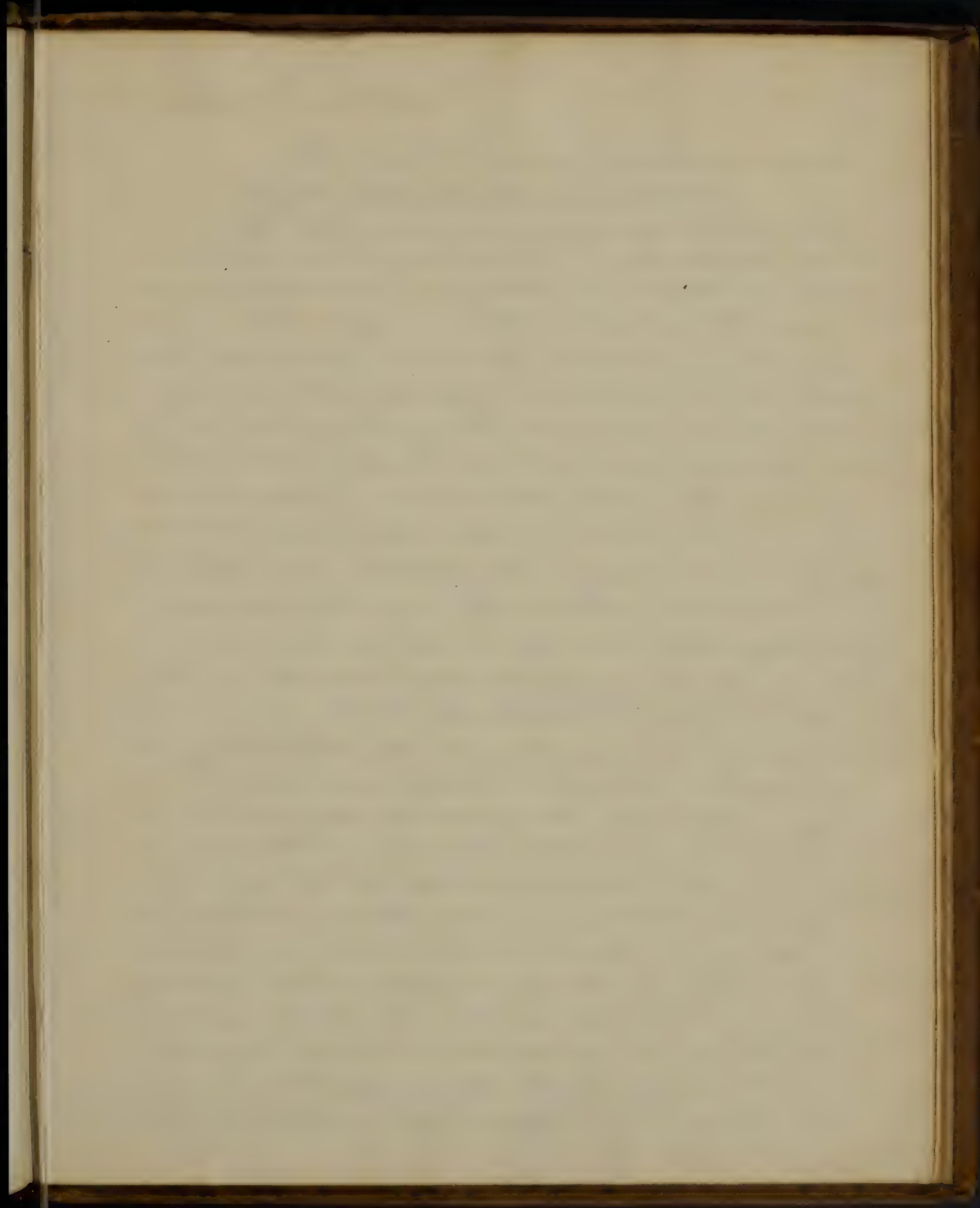
This Law goes upon the ground that the vendee is bankrupt - if you stop the goods, & he is not bankrupt you make yourself liable for all damages occasioned by stopping them. The vendor always runs this risk. This principle of the L. M.

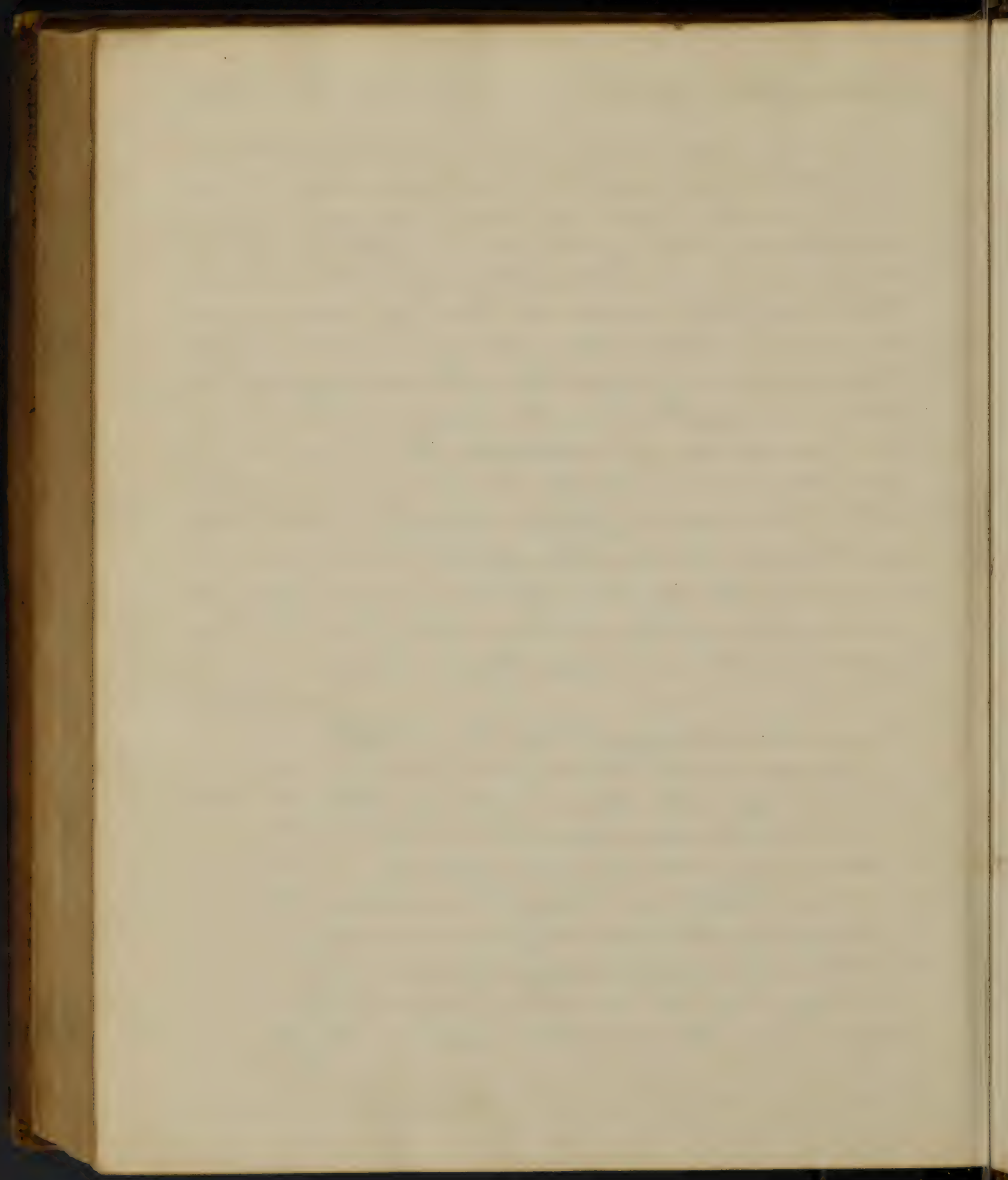
Sec. Mercatoria.

Of stopping Goods in transitu.

established as a presentation of funds if there are no persons on the roll of bankrupts who buy up large quantities of goods for the gratification of some one creditor. It is not established on the ground that the seller to day is more meritorious or more entitled to lose nothing than the one who sold yesterday or years ago, & who have not now this right. If the property has risen in value between the time of sale & that of stopping in transitu, & after stopping it turns out that the vendee is not bankrupt, the vendor (I suppose) is not liable for the increase. This transitus must stop somewhere. Where? Suppose the goods are actually delivered & are in the possession of the vendee, or his agent, as if they are put on board a ship to go to the vendee or delivered at the agent's place of residence, the transitus is at an end. It is not at an end till put on board of the last conveyance which are to carry them to the vendee, or are in possession of the agent at his place of residence. 2 H. Bl. 505.

Suppose a bill of Lading of these Goods has been delivered over to the agent. Will that prevent the stopping of them? No. if they are still in transitu. But suppose the bill of Lading has been assigned over to a bona fide holder for a valuable consideration. Can the purchaser hold the Goods, or in other words is he the purchaser of the bill? Sure. Why sh^d he not be sure? It has been determined that if the bill of Lading is a negotiable instrument, & will carry the property & vest it in the Assignee, the transitus is at an end. He had a right to purchase the bill, it being a negotiable instrument. 2 S. R. 63. 3 at H. 683.





Lex Mercatoria.

There are few observations to make, before I conclude.

With respect to Mariners.

When there is no special agreement, to the contrary by the Shipowners, but they are to receive so much per month, they are never entitled to their wages till they get to the port of delivery, & then they are entitled to their pay. The reason is, that till the Ship arrives they are not sure of receiving any wages. Other workmen are entitled to their pay month by month hired by the month, but sailors are not, for if the vessel is lost before she reaches the port of delivery the sailors lose all their wages. If the vessel performs her outward bound voyage, & is lost on the inward bound voyage, the Shipowners are entitled to their wages for the outward bound voyage, & for that only. Suppose the sailors contract not to receive their wages, till they return of the vessel, & she is lost on her inward bound voyage, still they are entitled to their wages for the outward bound voyage. ^{that is not ordinary} The intention is only to postpone the day of payment till they return. The Law takes care of sailors, & sometimes restrains them as it does minors - it restrains them from contracting not to receive their wages. now if the sailors agree not to receive their wages till the vessel returns, & she is lost coming back, the sailors are entitled to their wages till the last port before she was lost. Sailors when contracting for their wages never think that the vessel will not return. They rely by means of the above contract that they will stay with her till she gets back, if she does come back. 2 H. 13. 666. 2 Burr 728. 1 Sid 124. 179. Burr. 1844. 5 H. 4. 376. 634. 1843. Seamen are entitled to interest on their wages, from the time they are due.

Lex Mercatoria.

Of Seamen.

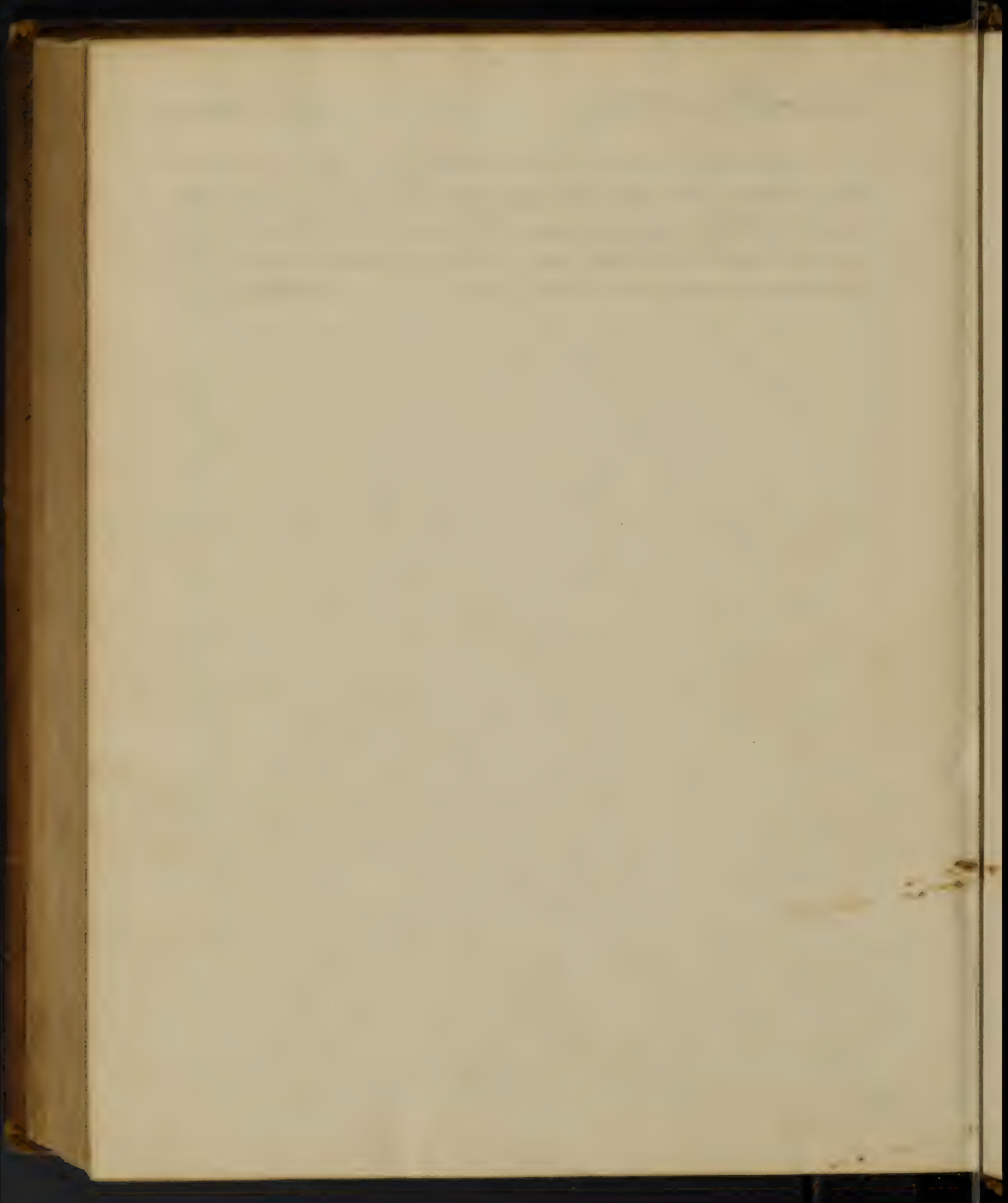
There are certain regulations about Seamen losing their wages. It is said they lose their wages by making disturbances on board. Now I suppose the Captⁿ must mark them, & when the Merchant is informed of it, he will not pay them. Sailors are persons who do not usually go to Law, & if the Merchant does not pay them, they swear & d. d. & will do no more. But suppose they do go to Law, now their recovery will depend upon circumstances. If the disturbance amounts to mutiny or any thing like it, they certainly will not be entitled to their wages. So also it is said if Captⁿ may confine them for disturbance, or put them on shore, but in doing this, he must act reasonably - he must not put them on a shore where they will starve. In some sorts it is said that for disturbance on board, the Captⁿ cannot mark them, so that they will lose their wages. He may confine them, or put them on shore, but if they rebel & do not repent & that reasonably, he may mark them for nonpayment of their wages. Here you see it is left with the Captⁿ to say what is rebellious. So likewise they lose their wages for wilful absence which occasions delay, as if the ship is to sail on a certain day, & they are not on board at that time, they lose their wages. So if they leave the ship before they are regularly discharged. The whole then is this. Seamen will not lose their wages merely for disturbances, so far this they may be confined or put on shore. But if they rebel & do not reasonably repent, or if they wilfully absent themselves, or leave the ship before they are regularly discharged, they will lose their wages. May^o 1212. 1st 1579.

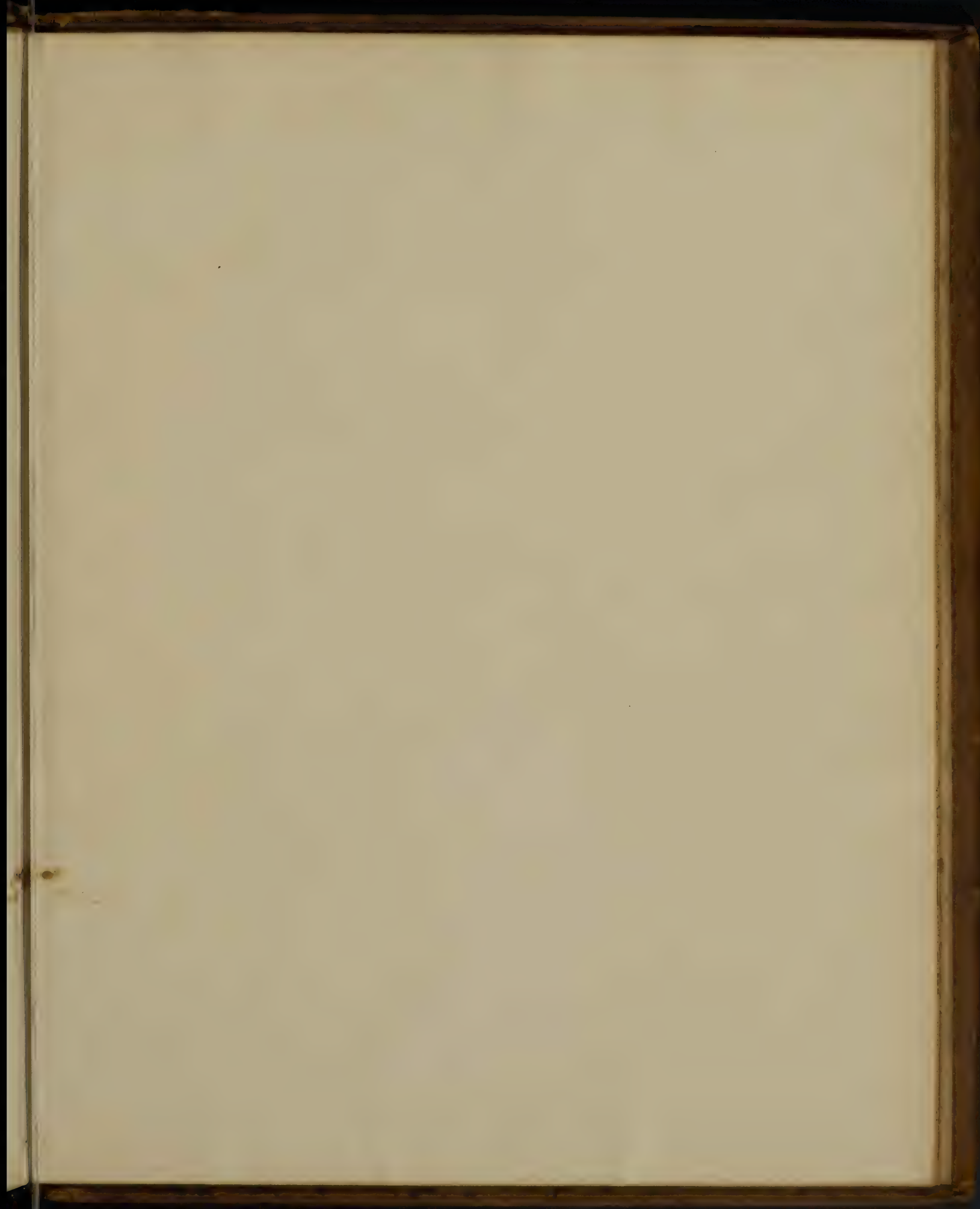
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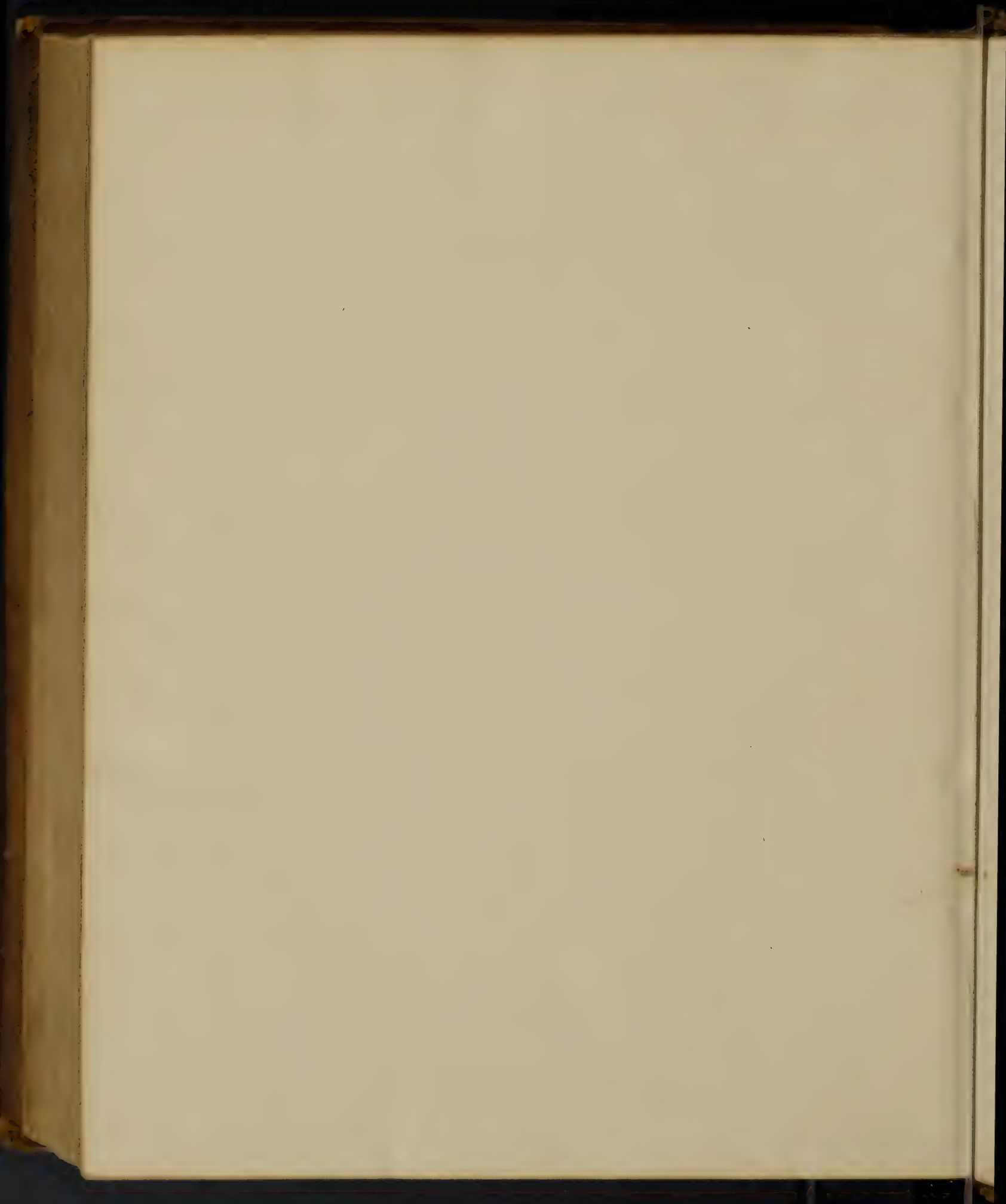
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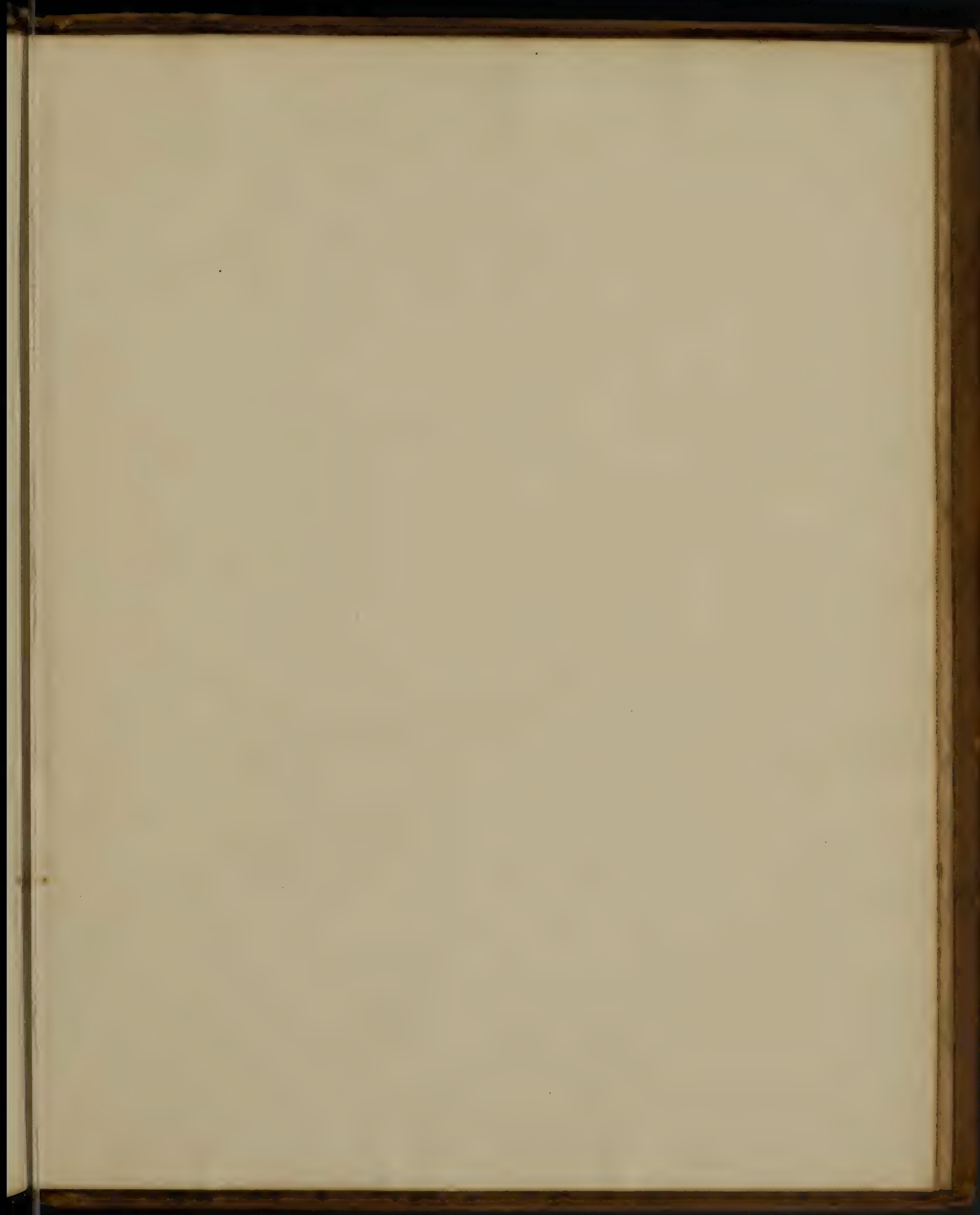
Of Seamen.

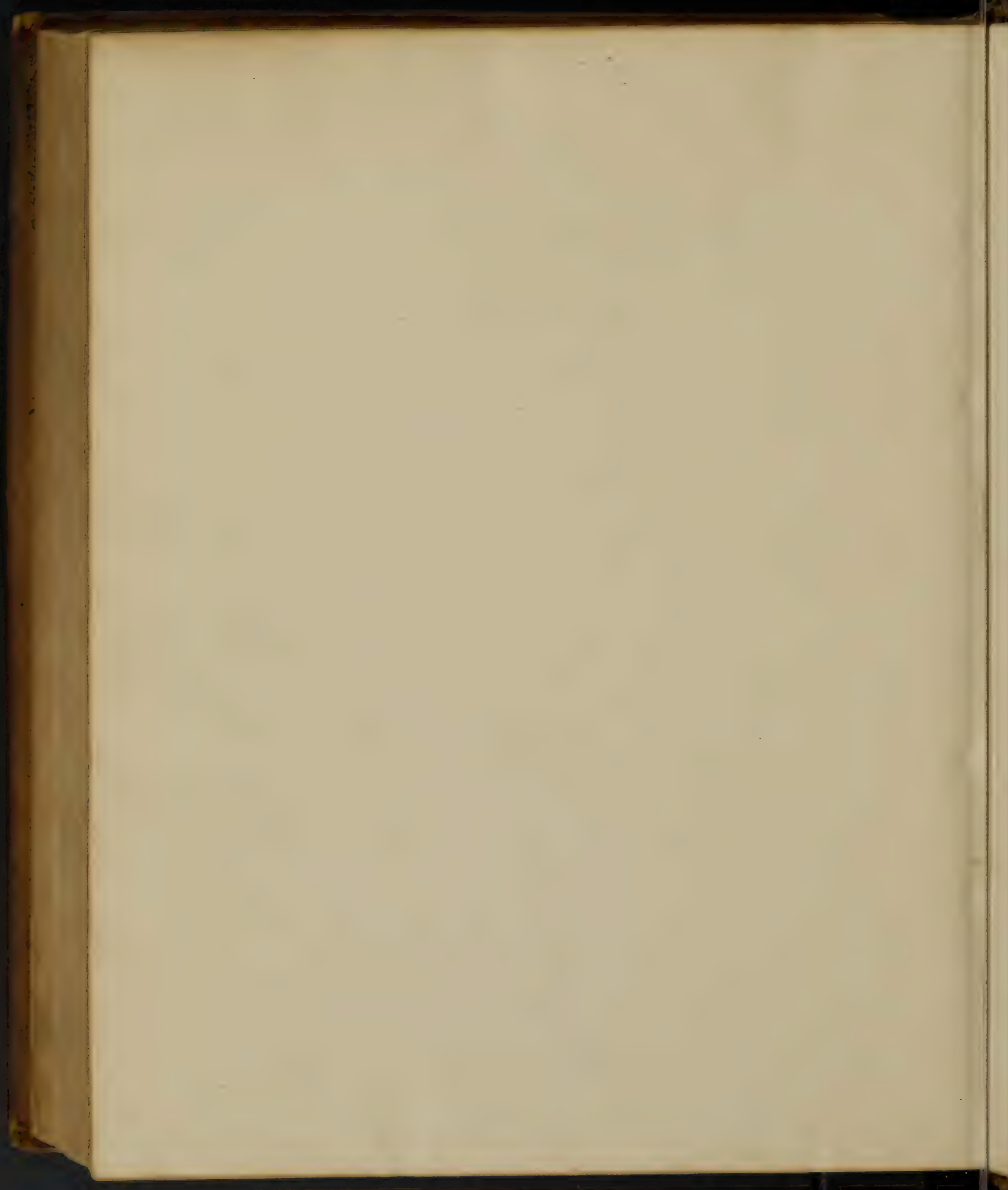
If a Seaman becomes disabled in the voyage & can not perform his duty, being well when he set out, in this case he is entitled to his wages. If he was disabled when he set out, it would be otherwise. This is a mere mercantile regulation, unknown to the Common Law. 2 H. Bl. 606. -

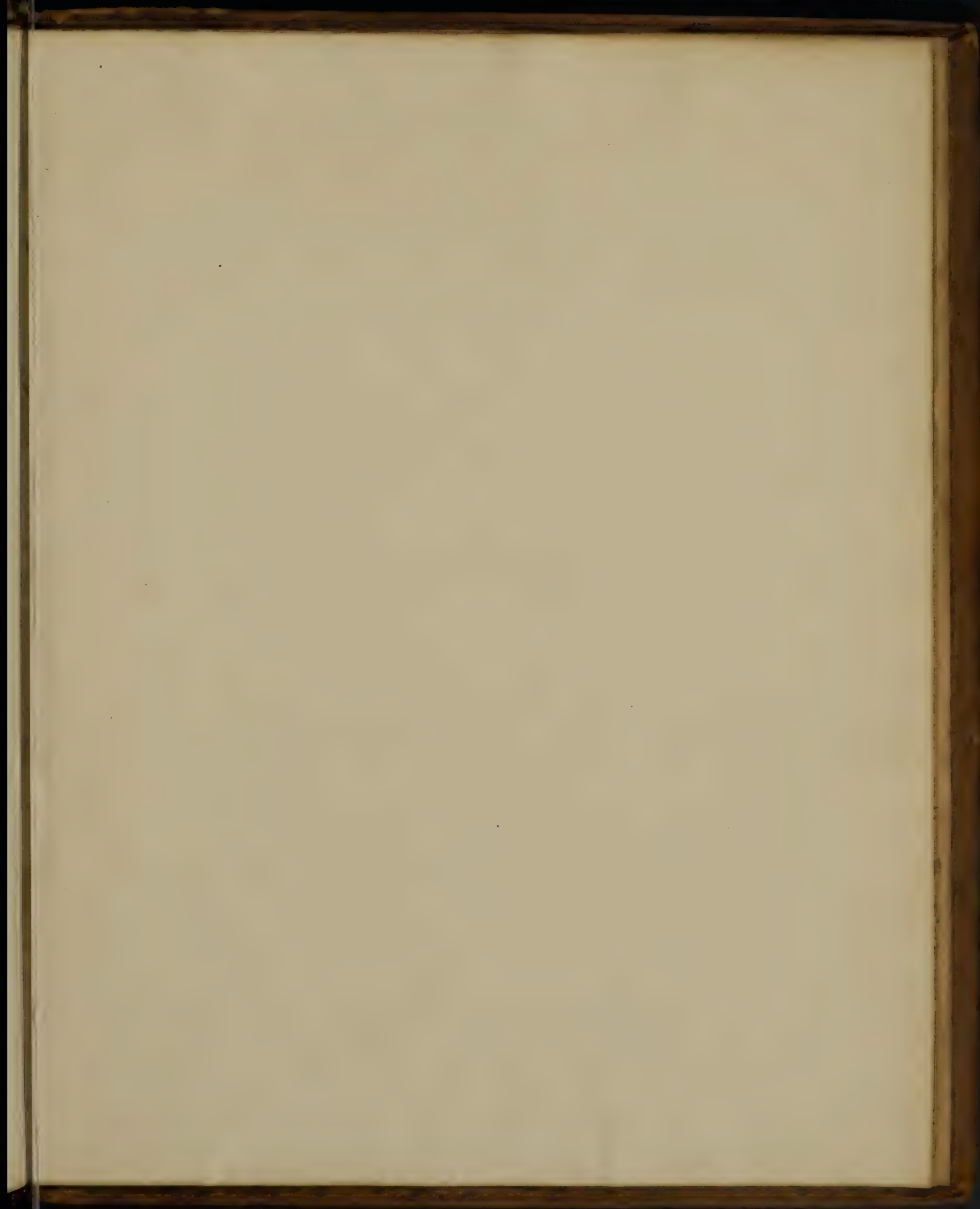


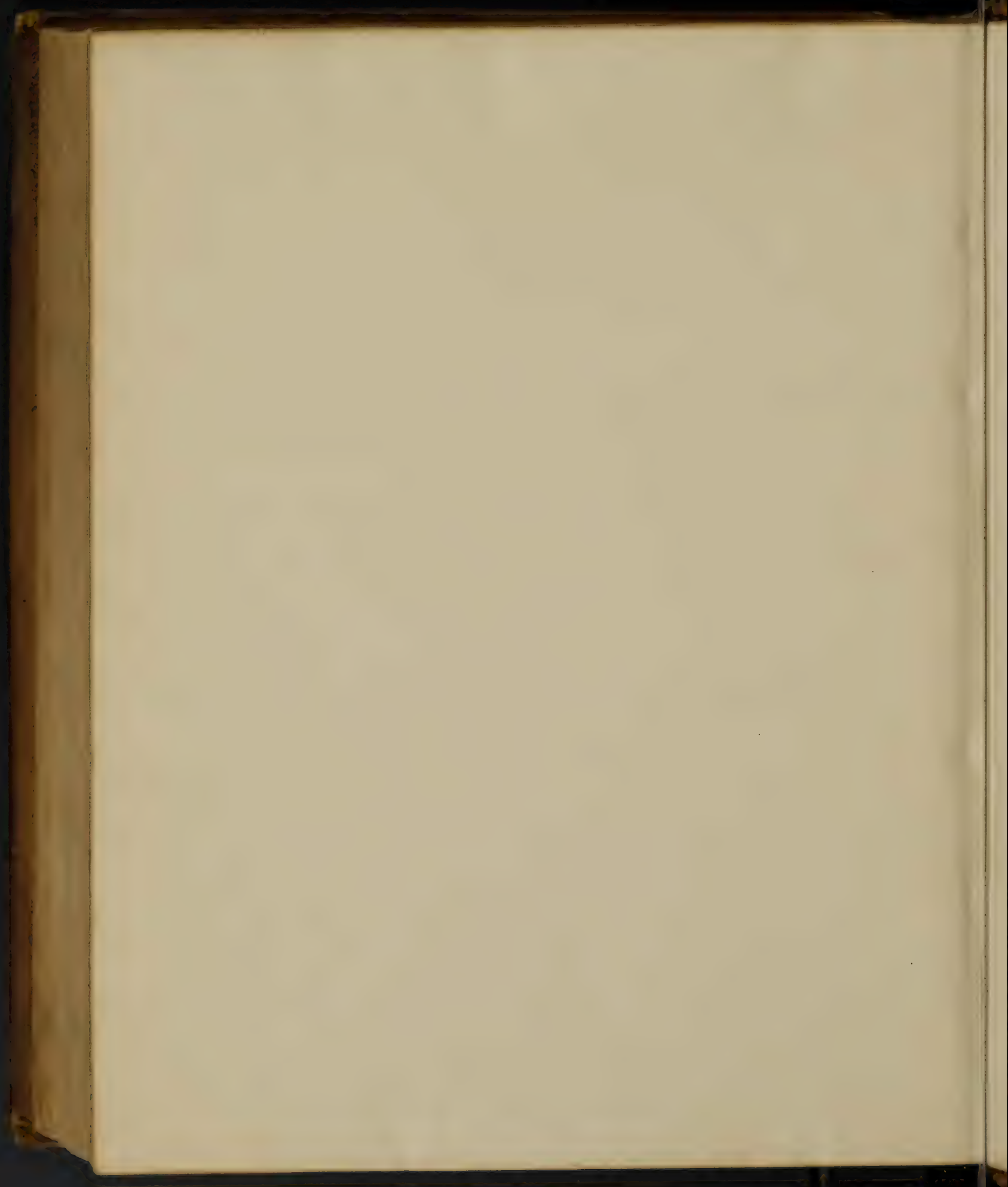


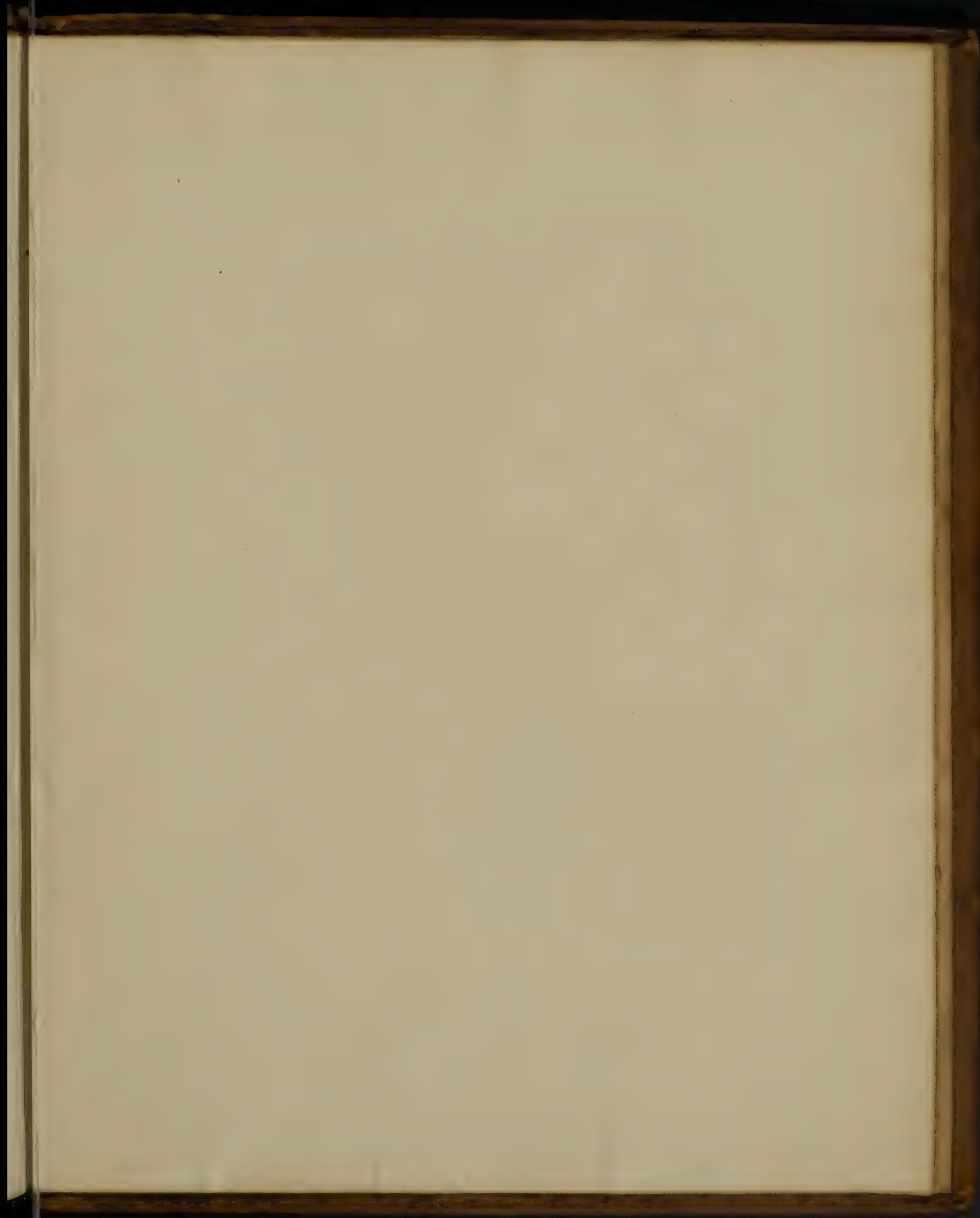


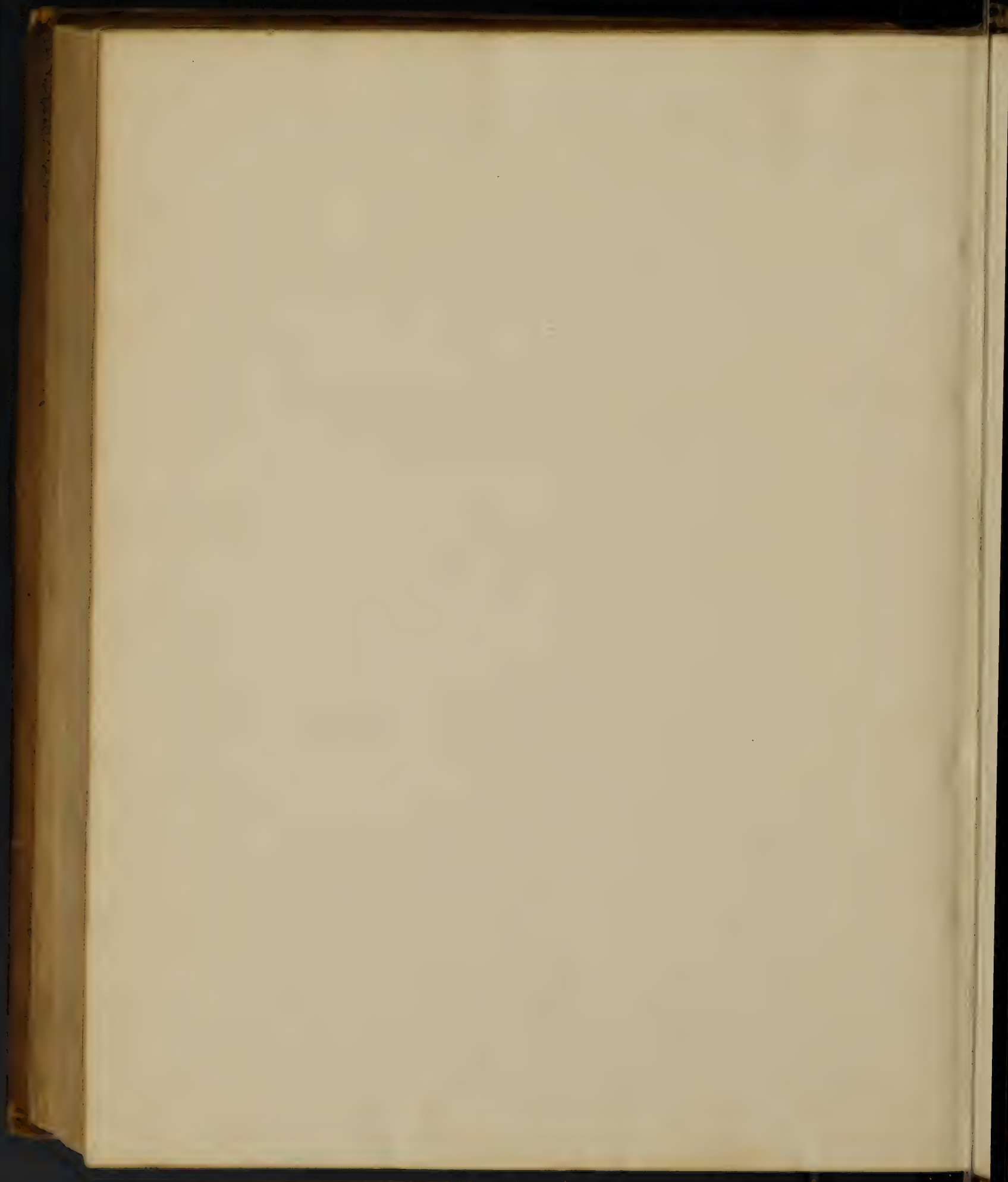


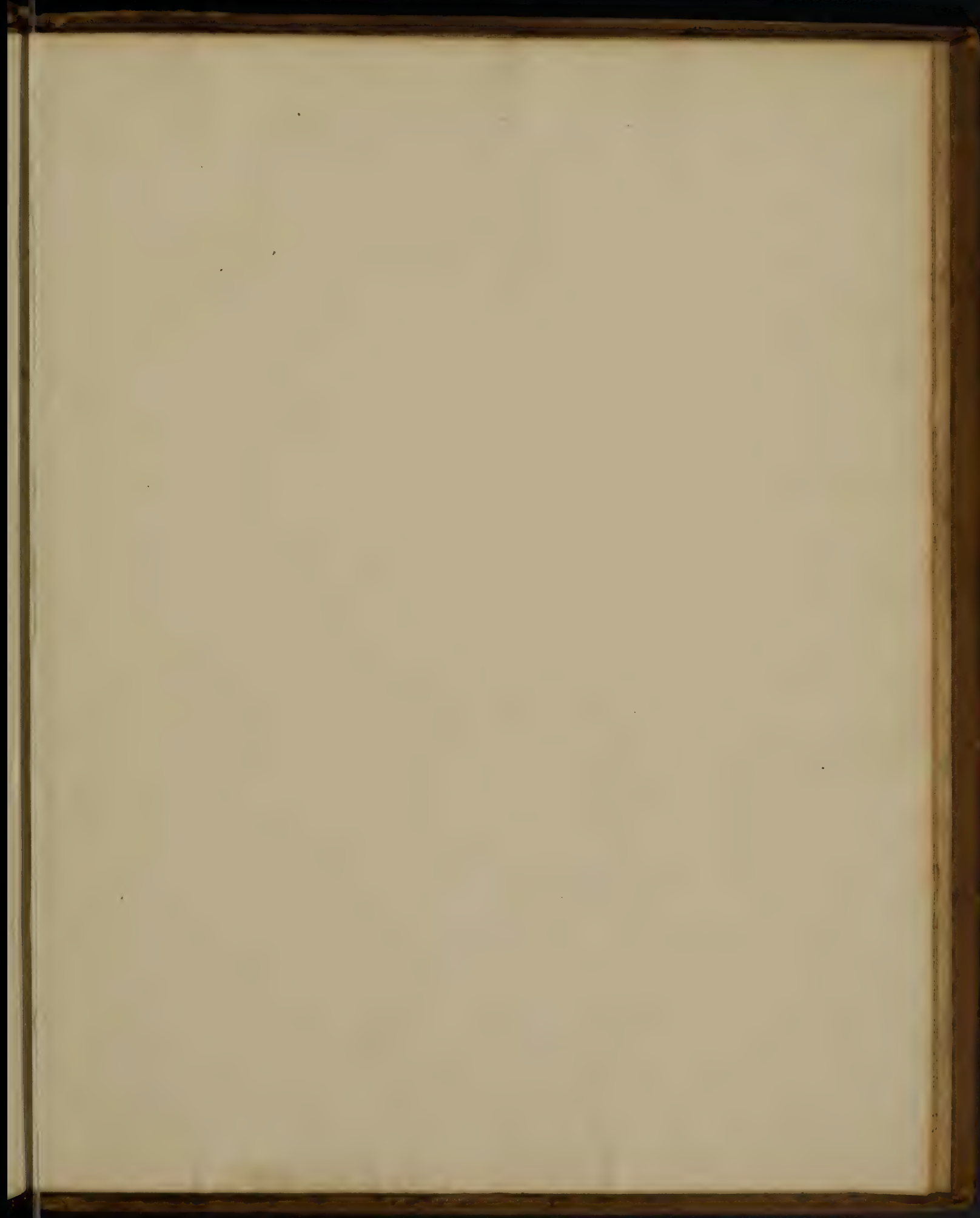


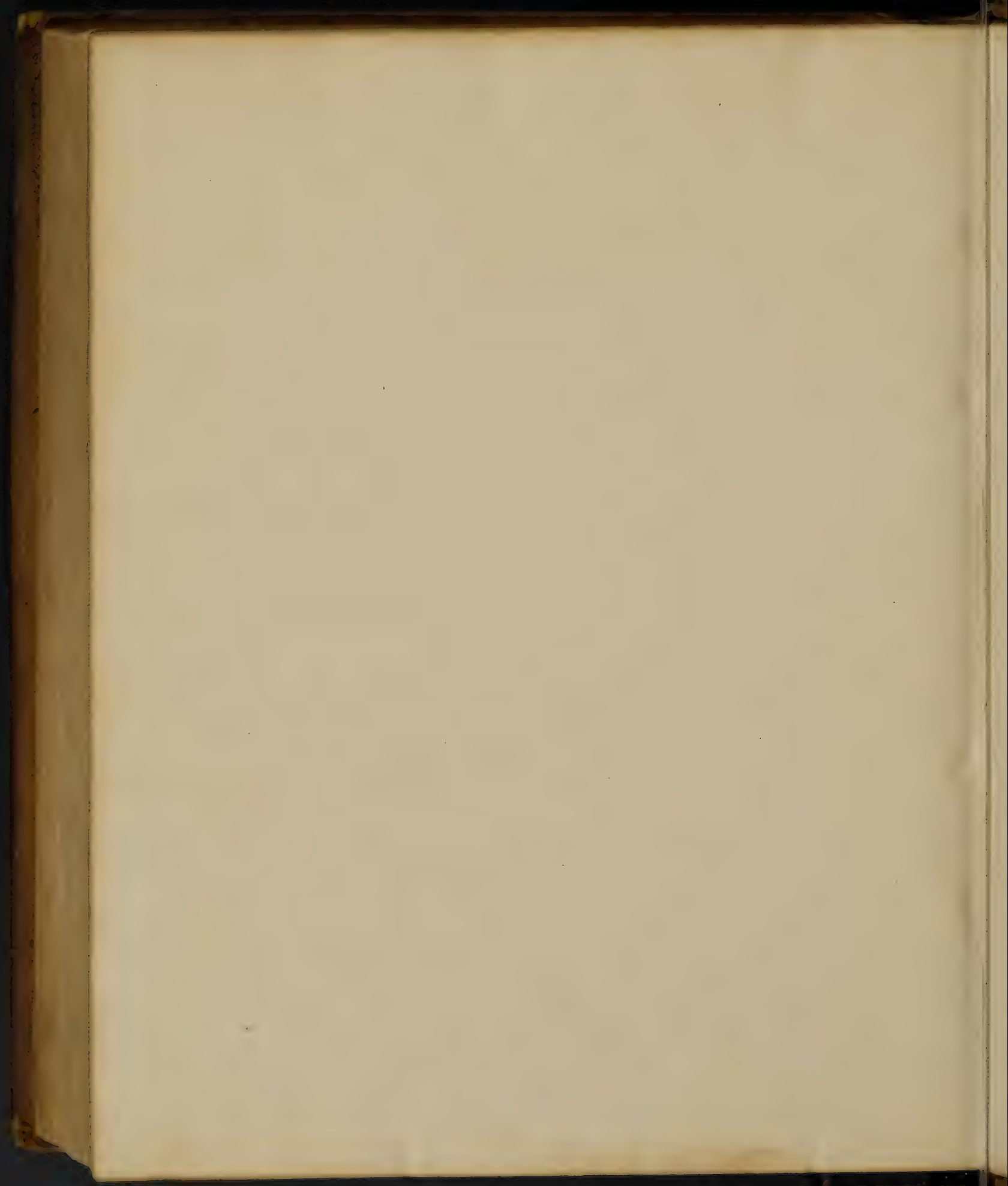


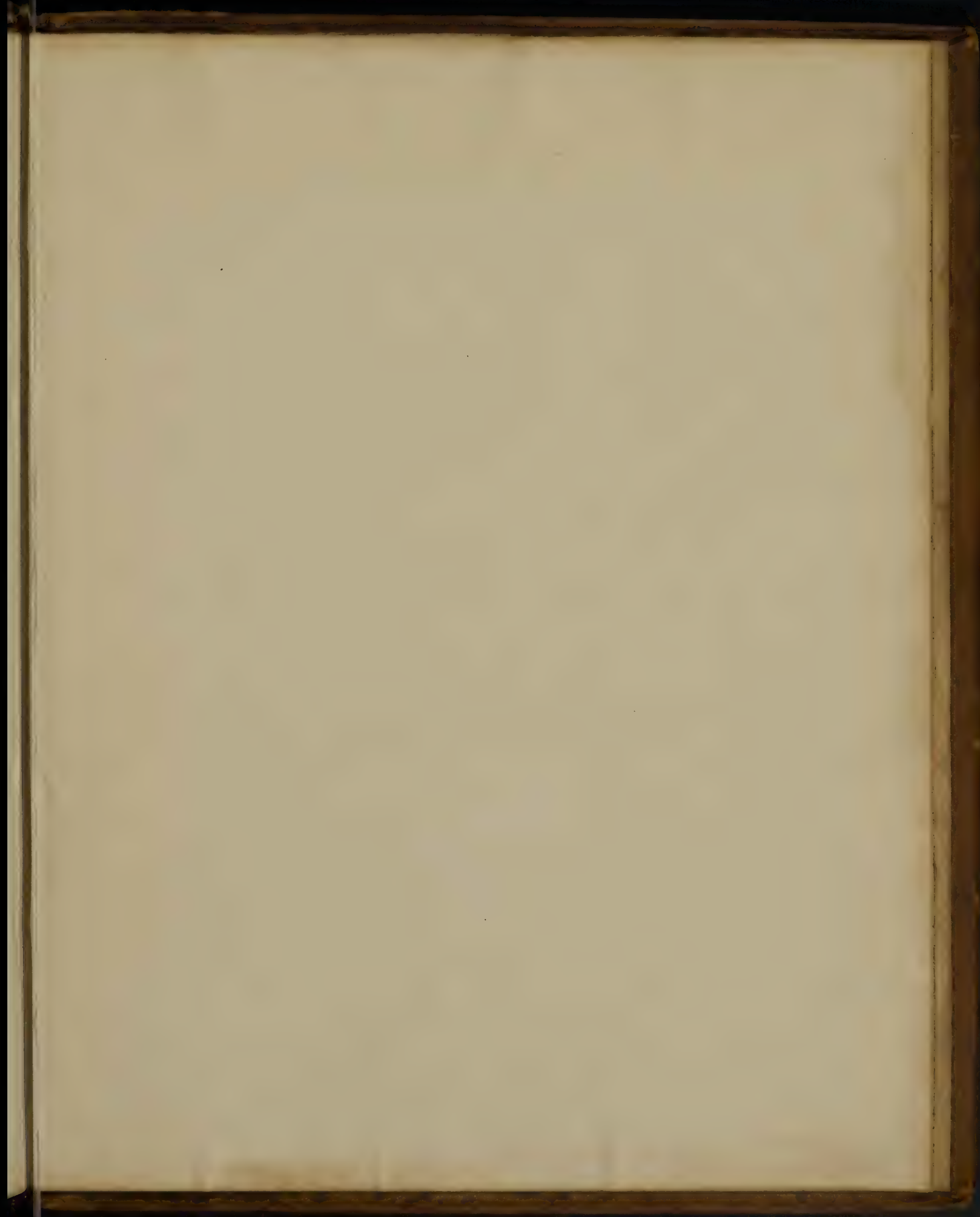


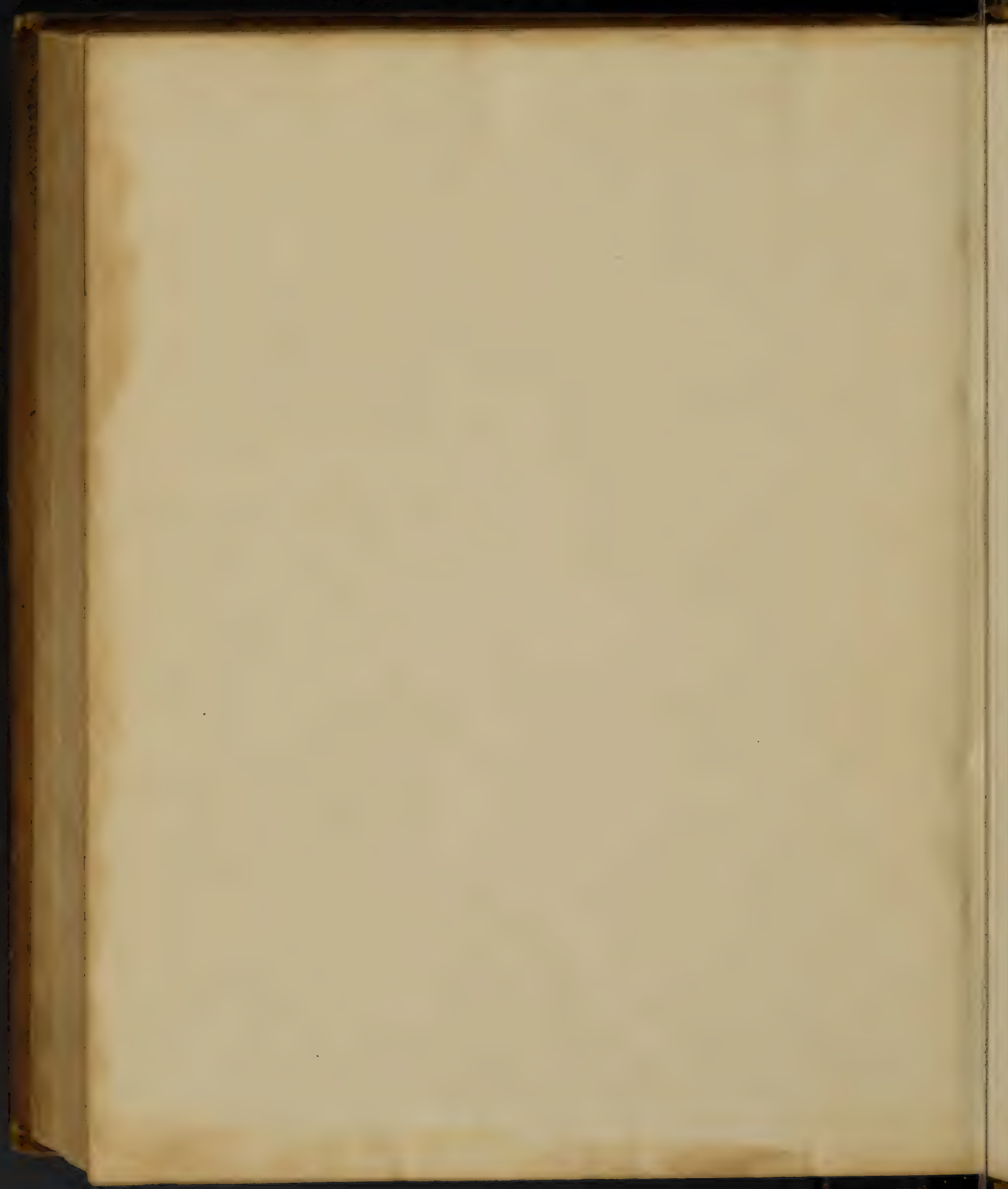


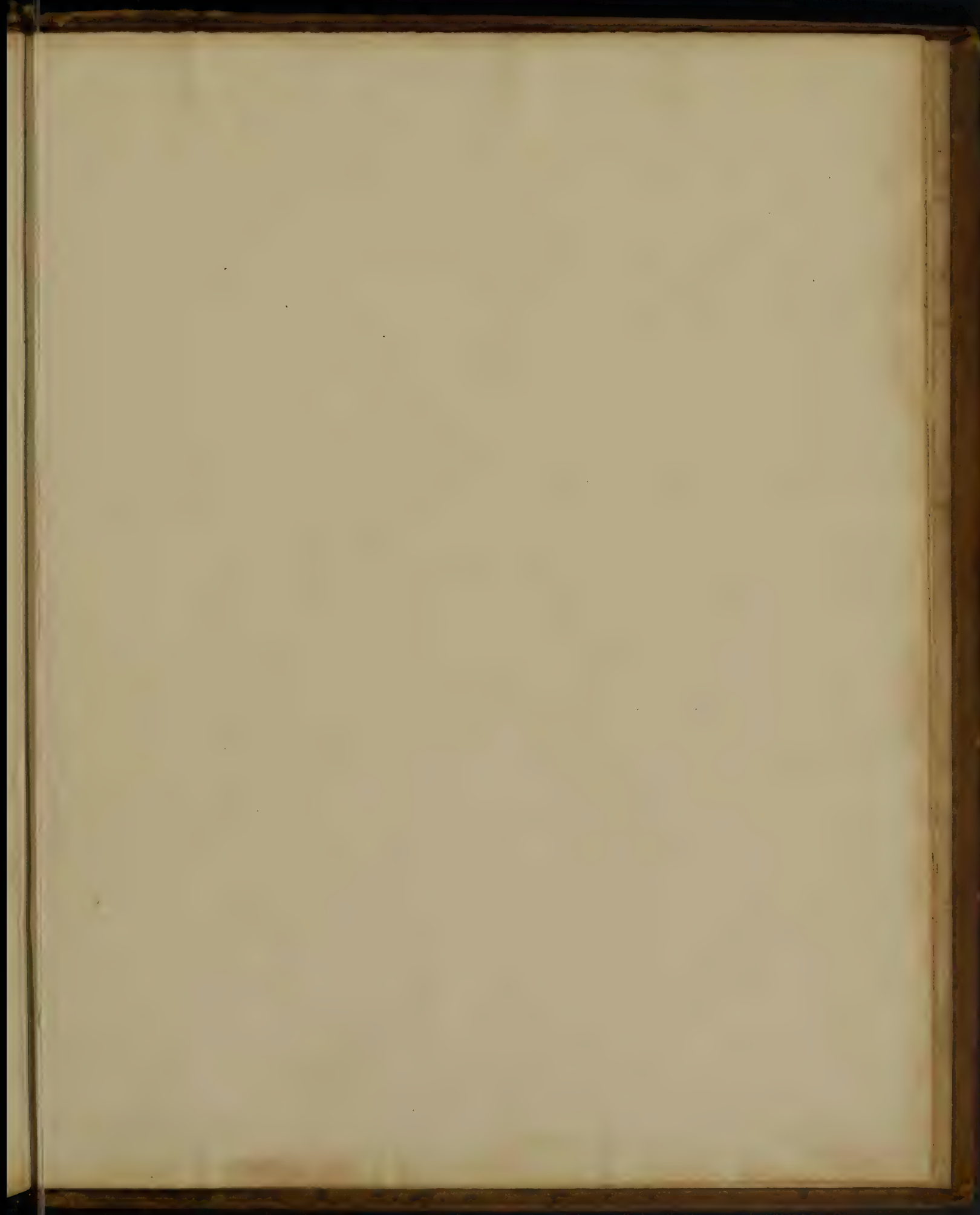


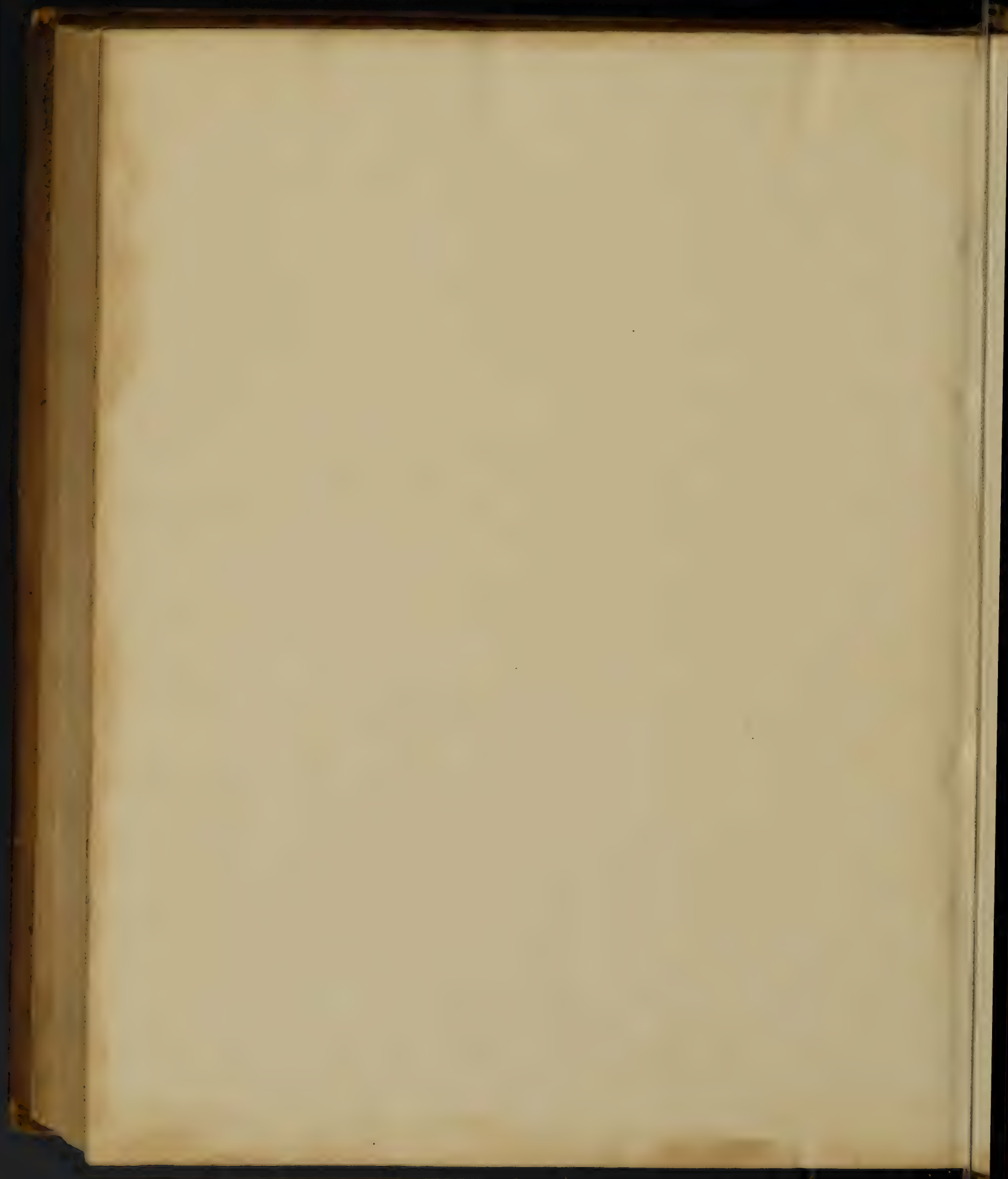


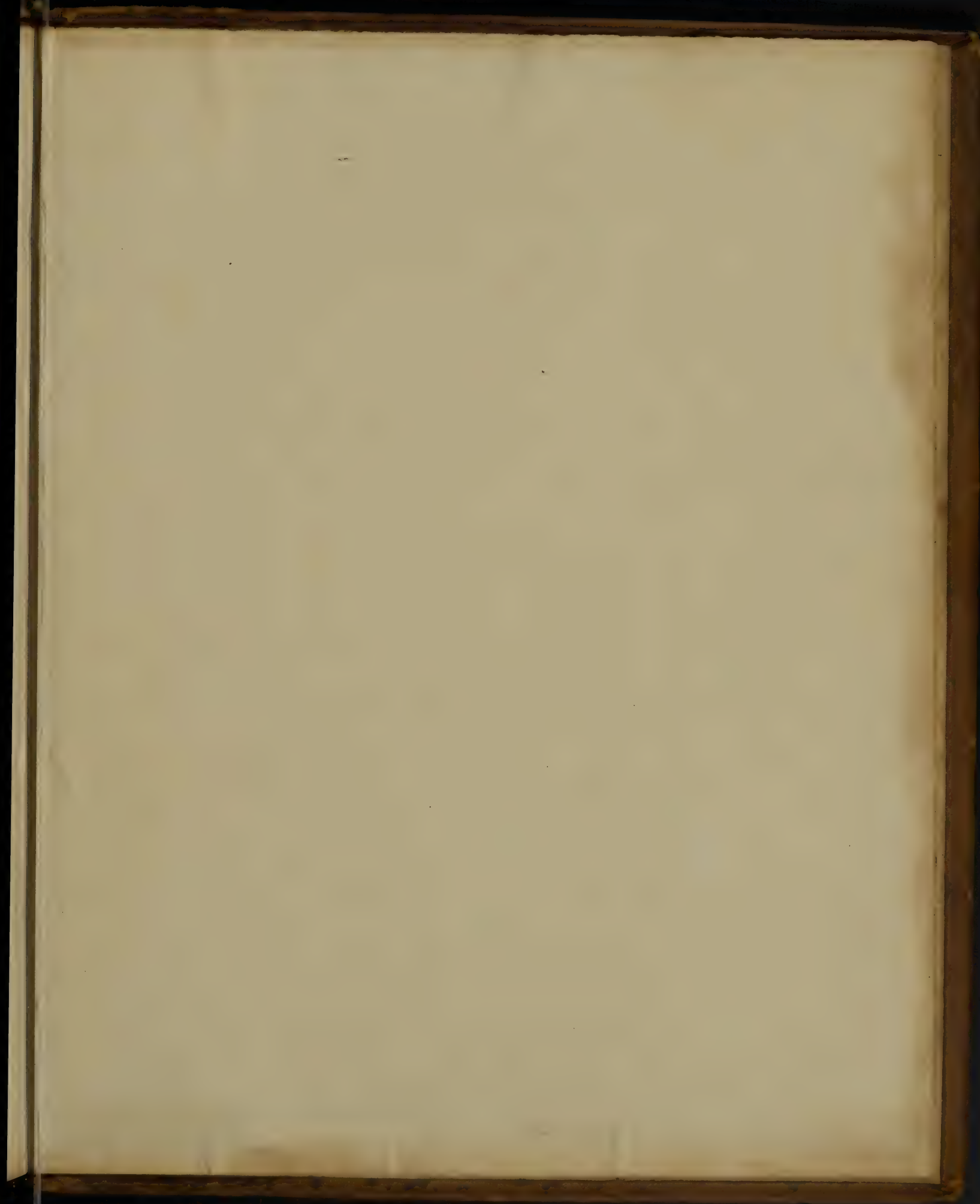


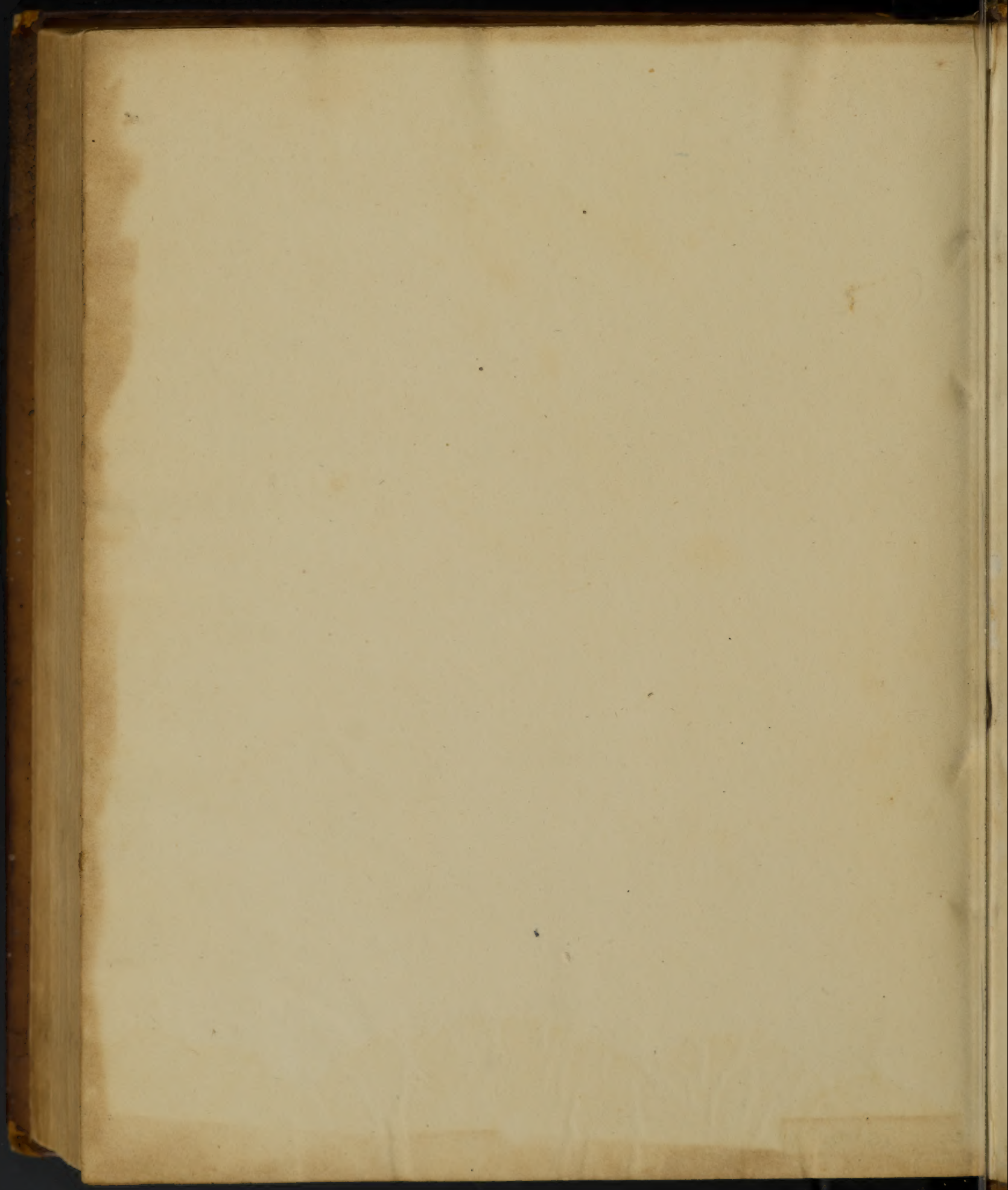








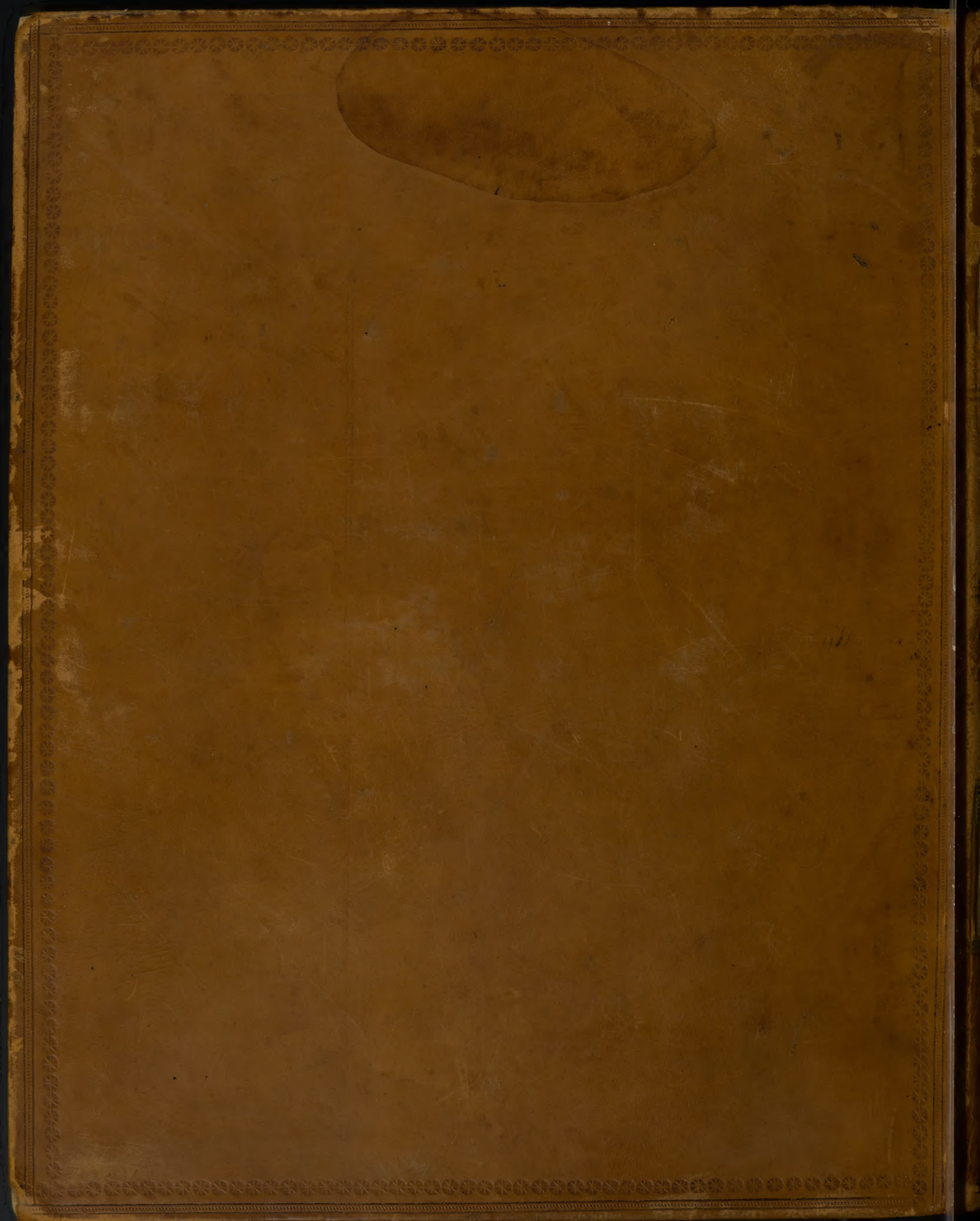




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